NOV 29 2005

GSA Office of the Chief Acquisition Officer

MEMORANDUM FOR ROBERT R. JARRETT
DIRECTOR
DEFENSE ACQUISITION REGULATIONS COUNCIL

FROM: RALPH J. DESTEFANO, DIRECTOR
REGULATORY AND FEDERAL ASSISTANCE
PUBLICATIONS DIVISION

SUBJECT: FAR Case 2004-025, Government Property

Attached are comments received on the subject FAR case published at 70 FR 454878; September 19, 2005. The comment closing date is November 18, 2005.

Response Number	Date Received	Comment Date	Commenter
2004-025-1	09/19/05	09/19/05	Teresa McGary
2004-025-2	09/20/05	09/20/05	Smith Pachter McWhorter & Allen
2004-025-3	09/26/05	09/26/05	Charles A. Waszcak
2004-025-4	10/08/05	10/08/05	Nash & Cibinic
2004-025-5	10/19/05	10/19/05	John Roberts
2004-025-6	10/31/05	10/31/05	Bae Systems
2004-025-7	09/21/05	09/21/05	Beth Myers
2004-025-8	11/01/05	11/01/05	U.S. Army (AFSC)
2004-025-9	11/04/05	11/04/05	Kathy Hughes
2004-025-10	11/07/05	11/07/05	David L. Gruntman

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Response Number	Date Received	Comment Date	Commenter
2004-025-11	11/07/05	11/07/05	Dr. Douglas N. Goetz
2004-025-11-2	11/08/05	10/27/05	Dr. Douglas N. Goetz
2004-025-12	11/14/05	11/09/05	Tom Ruckdaschel
2004-025-13	11/14/05	11/14/05	Dianne Blankenstein
2004-025-14	11/15/05	11/15/05	Jennifer McKamey
2005-024-15	11/16/05	11/16/05	Integrated Dual-Use Commercial Companies
2005-024-16	11/16/05	11/16/05	IRS Bureau Department of Treasury
2005-024-17	11/17/05	11/17/05	Elaine F. Allan
2005-024-18	11/16/05	11/16/05	National Association of State Agencies for Surplus Property
2004-025-19	11/17/05	11/17/05	California State Polytechnic University (John B. Wyatt)
2004-025-20	11/17/05	11/17/05	James W. Waak
2004-025-21	11/17/01	11/01/05	Boeing
2004-025-22	111/7/05	11/17/05	Ronald L. Kovach
2004-025-23	11/17/05	11/17/05	Richard Schultz
2004-025-24	11/17/05	11/17/05	ATK
2004-025-25	11/17/05	11/17/05	General Atomics

Response Number	Date Received	Comment Date	Commenter
2004-025-26	11/18/05	11/18/05	James Taylor
2004-025-27	11/17/05	11/17/05	FSS/GSA
2004-025-28	11/18/05	11/17/05	California State Polytechnic University (John B. Wyatt)
2004-025-29	11/18/05	11/18/05	Gregory S. Hill
2004-025-30	11/18/05	11/18/05	Daniel R. Fleischman
2004-025-31	11/18/05	11/18/05	DOD/IG
2004-025-32	11/18/05	11/18/05	DCMA
2004-025-33	11/18/05	11/18/05	CODSIA
2004-025-34	11/18/05	11/18/05	Mohawk Innovative Technology, Inc.
2004-025-35	11/18/05	11/18/05	John I. Paciorek
2004-025-36	11/18/05	11/18/05	Pamela J. Kontz
2004-025-37	11/18/05	11/18/05	Parsons
2004-025-38	11/18/05	11/18/05	Nancy Garsik
2004-025-39	11/16/05	11/16//05	EPA

Attachments

2004-025-1

Agency : NATIONAL AERONAUTICS AND SPACE ADMINISTRATION
Title : Federal Acquisition Regulation; Government Property
Subject Category : Federal Acquisition Regulation (FAR): Federal Acquisition Regulation (FAR): Fec Acquisition Regulation (FAR): Government property; management and disposition Government property; management and disposition Government property; manage and disposition
Docket ID : FAR Case 2004-025
CFR Citation : 48 CFR 1, et al.
Published : September 19, 2005
Comments Due : November 18, 2005
Phase : PROPOSED RULES

Your comment has been sent. To verify that this agency has received your comment, please contact the agency directly. If you wish to retain a copy of your comment, print out a copy of this document for you

Please note your REGULATIONS.GOV number.

Regulations.gov #: EREG - 1 Submitted Sep 19, 2005

Author : Ms. Teresa McGary
Organization : 30 Cons/LGCZH
Mailing Address :
Attached Files :

Comment : 45.5 This para makes it sound like support Govt Prop Admin is always for subcontractors. I work on an installation and we get requests for support Govt Proj Admin all the time and none of them are for subcontractors. They are considered p at "alternate" locations. In this instance we don't need the prime's permission to do support administration at the alternate location.

2004-025-2

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September 20, 2005

Ms. Laurieann Duarte
FAR Secretariat
General Services Administration
Regulatory Secretariat (VIR)
1800 F Street N.W.
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Re: Proposed Changes to Government Property Provisions – FAR Case 2004-025

Dear Ms. Duarte:

I am submitting these comments pursuant to 70 F.R. 54878, September 19, 2005, with respect to proposed revisions to the FAR addressing government property. My comments pertain exclusively to two issues: (1) elimination of passage of title to property accounted for in overhead under cost type contracts[1]; and (2) providing unlimited discretion in contracting officials to insert the "as is" government property clause in both fixed price and cost type contracts. Both revisions are inimical to the public interest and, in the case of

[1] For the past eleven years I have been extensively involved in issues relating to state sales tax "sale for resale" exemptions and refunds related to overhead property acquired by contractors. I litigated the only recent ASBCA cases relating to this issue, General Dynamics Corp., ASBCA No. 49339, 97-2 BCA ¶ 29,167 (on summary judgment), and National Steel and Shipbuilding Co., ASBCA No. 50960 (disposed of by settlement). I served as an expert witness on passage of title on behalf of Raytheon in Strayhorn v. Raytheon E-Systems, Inc., 101 S.W.3d 558 (Tex. Ct. App. 2003), petition for review denied, 2003 Tex. LEXIS 320 (Tex. 2003). I have also written extensively on the subject: Johnson, "Price Adjustment Clauses for State and Local Taxes in Federal Government Contracts; *Aerospace* and Taxes Charged to Contracts Through Overhead," 26 Pub. Contr. L. J. 599 (1997); Johnson and Buie, "Taxes, Refunds, Credits and Cash: Handling the Government's Share of Sales and Use Taxes Refunded Under *Aerospace Corp. v. State Board of Equalization*," 28 Pub. Contr. L. J. 449 (1999); Johnson, "'Cash Versus Credit': The Application of Federal Appropriations Law to Refunds and Rebates in Contractor Overhead," 30 Pub. Contr. L. J. 9 (2000); Johnson, "The Implication of the Virginia State Sales Tax Increase for Federal Contractors," Federal Contracts Report, Vol. 81, No. 21, p. 2 (June 2004).

Rec'd 9-22-05 cme

2004-025-2

the title passage issue, will overturn existing law and result in hundreds of millions of dollars of increased costs under government cost type contracts.

Title to Overhead Property Under Cost Type Contracts

Under FAR provisions that have been in place since the end of WWII, the Government acquires title to property acquired by contractors and accounted for in indirect cost (overhead) in two different ways. For fixed price contracts containing the Progress Payments clause (FAR 52.232-16) title to overhead property passes pursuant to paragraph (d)(2). Under cost type contracts title to overhead property passes under FAR 52.245-5(c)(3).[2]

On the basis of these title passage provisions, at least six states[3] have exempted contractor purchases of overhead property from state sales and use taxes. These exemptions, which are the result of the application of state law and do not involve any federal constitutional immunity, have resulted in significant savings to the Government under cost type contracts and subcontracts.[4] As just one example, the ***refunds*** in California for open contractor sales tax years following the 1990 decision in *Aerospace*[5] totaled approximately $500,000,000, much of which related to cost type contracts and inured to the Government's benefit.[6] This figure does not take into account the permanent decrease in state sales and use taxes to be reimbursed by the Government now and in the future, not only in California but in all of the states that have recognized the *Aerospace* precedent. These decreased sales and

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[2] Johnson, "The Implication of the Virginia State Sales Tax Increase for Federal Contractors," Federal Contracts Report, Vol. 81, No. 21, p. 2 (June 2004); see also Wyatt, "The 'Three Musketeers' of Overhead Property: *Motorola, Hughes,* and *Raytheon* Cases," Journal Of Contract Management, p. 23 (Summer 2005).

[3] California, Missouri, Arizona, Maine, Texas and Illinois.

[4] In Illinois, the exemption was implemented by regulation. See Ill. Adm. Code § 130.2706, effective August 13, 2001. In California, Missouri, Arizona and Maine, state court decisions resulted in application of the exemption. Aerospace Corp. v. State Board of Equalization, 218 Cal. App. 3d 1300 (1990); McDonnell Douglas Corp. v. Director of Revenue, 945 S.W.2d 437 (Mo. 1997) (en banc); Motorola, Inc. v. Arizona Dep't of Revenue, 993 P.2d 1102 (Ariz. Ct. App. 1999); Bath Iron Works v. State Tax Assessor, No. AP-00-80 (Me 2000); Strayhorn v. Raytheon E-Systems, Inc., 101 S.W.3d 558 (Tex. Ct. App. 2003), petition for review denied, 2003 Tex. LEXIS 320 (Tex. 2003).

[5] Aerospace, *supra*, 218 Cal. App. 3d 1300.

[6] Johnson and Buie, "Taxes, Refunds, Credits and Cash: Handling the Government's Share of Sales and Use Taxes Refunded Under Aerospace Corp. v. State Bd. of Equalization," 28 Pub. Cont. L.J. 451 (1999).

use taxes have made additional much needed appropriations available to the procuring agencies for the purchase of vital defense equipment.

The exact provision that has produced this significant savings under cost type contracts is the following portion of the current clause in FAR 52.245-5(c):

> (3) Title to all other property [property other than that to which the contractor is entitled to be reimbursed as a direct item of cost], the cost of which is reimbursable to the Contractor, shall pass to and vest in the Government upon –
>
> (i) Issuance of the property for use in contract performance;
>
> (ii) Commencement of processing of the property for use in contract performance; or
>
> (iii) Reimbursement of the cost of the property by the Government, whichever occurs first. [7]

The proposed revision to the FAR would eliminate this provision, and with it the exemption enjoyed by the Government from sales and use taxes on contractor overhead property allocable to cost type contracts. The new "all purpose" Government Property clause at FAR 52.255-1 would now state with respect to passage of title only the following:

> (e) *Title to Contractor-acquired property*. Title to all property purchased by the Contractor, for which the Contractor is entitled to be reimbursed ***as a direct item of cost***, under this contract, shall pass to and vest in the Government . . . . (emphasis added).

It seems clear that the FAR drafters have failed either to be aware of or focus on the costly impact of this revision, which would eliminate the state law "sale for resale" exemption for overhead property allocable to cost type contracts. This conclusion seems all the more likely, as the regulatory system envisaged by the proposed revisions would defy both logic and consistency. Thus, no exemption from state sales and use taxes would now be available for overhead property under cost type contracts, under which the Government

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[7] See the California, Missouri, Arizona and Texas cases cited in footnote 4, above.

directly reimburses the contractor with each payment voucher. But the exemption would continue to be available under fixed price contracts containing the Progress Payments clause, where the Government shoulders the cost of the taxes only through payment of the contract price. If the FAR drafters have made a policy decision based on some unarticulated logic that title should not pass to overhead property under cost type contracts, they should be consistent in their approach to the same question under fixed price contracts. If the proposed revision reflects a decision to benefit the state treasuries at the expense of the Federal Government under cost type contracts, there should be no reason for a different policy under fixed price contracts.

For these reasons the proposed revision should be withdrawn and full consideration given to the issues noted.

Government Property Furnished "As Is"

Under current regulations, the "As Is" Government Property clause, FAR 52.245-19, is permitted to be used ***only*** in fixed price, time and materials and labor hour contracts. See FAR 45.308-2. Moreover, the "As Is" clause may ***only*** be inserted in such contracts where the pre-condition of an opportunity for a meaningful pre-contract inspection is met. FAR 45.308-1(b). By contrast, the "As Is" clause may ***not*** be inserted in cost type contracts under any circumstances. See FAR 45.106(f)(1), mandating the clause at FAR 52.245-5 for cost type contracts.

Under the proposed revision, contracting officials, in lieu of current law, would have untrammeled discretion to insert the "As Is" provision in ***any*** type of contract without limitation. Proposed 52.245-1 would state in paragraph (d):

> (iii) The Government may, ***at its option***, furnish property in an "as is" condition. (emphasis added).

The quoted provision, included in the new "one size fits all" Government Property clause, would apply to cost contracts as well as to fixed price contracts. Moreover, the proposed regulation and clause would no longer refer to the precondition of FAR 45.308-1(b) mandating a meaningful pre-contract inspection. In addition, as noted above, this precondition applies only to fixed price, time and material and labor hour contracts. Even if the provision were determined to continue to be applicable to such contracts, ***it would have no application to cost type contracts***. Instead, under cost type contracts, the contractor would

be entirely at risk for the condition of the property, ***with no contractual right to a pre-contract inspection***.[8] To impose such a draconian rule on a cost type contractor would fundamentally alter the nature of cost contracting itself, under which minimum risk is allocated to the contractor in return for limited fees on estimated cost. Fixed price contractors may include contingencies in their prices where government property is furnished "as is." Cost type contractors, however, may not,[9] and would thus be exposed to far greater risk than their fixed price counterparts – in effect a contracting world turned upside down. It seems unlikely that the drafters of the revision have given adequate thought to this bizarre result.

Conclusion

The two points that this comment addresses share a common thread. By tinkering with a long-established and well-settled area of government property law in apparent ignorance of the consequences, the drafters have produced results they could neither have anticipated nor desired. In the view of this writer, the root of the problem lies in the attempt to combine the various Government Property clauses into a single cumbersome provision, blurring and even demolishing the common-sense distinctions that have existed for many years between fixed price and cost type contracts. Accordingly, I suggest that the FAR Secretariat withdraw the proposed revision and return it to the drafters for the additional analysis it merits.

Sincerely,

SMITH PACHTER MCWHORTER & ALLEN, P.L.C.

Richard C. Johnson

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[8] The proposed revision does not purport to alter FAR 45.308-1, but the unlimited "option" language of the new Government Property clause might well be construed to overcome the admonition of FAR 45.308-1 for a meaningful pre-contract inspection. Moreover, the proposed revision ***does*** eliminate FAR 45.106(f)(1), which currently mandates inclusion of the clause FAR 52.245-5, to the exclusion of FAR 52.245-19, in all cost type contracts. Thus, under the proposed revision, there would be no limit whatsoever on the Government's ability to insert the "As Is" language in cost type contracts.

[9] FAR 31.205-7.

2004-025-3

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September 26, 2005

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Ms Duarte,

Please reference:

- **FAR case 2004-025**
- FAR clause paragraph 52.245-1(k), "Abandonment of Government Property"

1. The final rule paragraph reads as follows:

> "(k) Abandonment of Government property.
> (1) The Government shall not abandon sensitive Government property or termination inventory without the Contractor's written consent.
> (2) The Government, upon notice to the Contractor, may abandon any nonsensitive Government property in place, at which time all obligations of the Government regarding such property shall cease.
> (3) The Government has no obligation to restore or rehabilitate the Contractor's premises under any circumstances; however, if Government--furnished property is withdrawn or is unsuitable for the intended use, or if other Government property is substituted, then the equitable adjustment under paragraph (i) of this clause may properly include restoration or rehabilitation costs."

2. **RECOMMENDATION**: Add the following thought or sentence, either as an additional sentence to (k)(2), or as new paragraph (k)(4):
"The Government shall not abandon in place any Government property on any Federal Installation."

3. **RATIONALE:** The avenue of abandoning Government property with the contractor is for the convenience of the Government. It permits the Government the flexibility to optimize economic disposal of certain property held by the contractor. Unless we plainly indicate with revised language in paragraph (k), some misguided Government employee will attempt to abandon Government property on a Federal installation, thereby negating the beneficial economic effect. Indeed, the effect of abandonment of Government property on a Federal installation would mean INCREASED costs of property disposal accruing to an unsuspecting installation commander or manager.

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4. **HISTORY:** Government property in the possession of a contractor performing work on Federal installations, has been incorrectly authorized for abandonment in the past, causing unnecessary direct and indirect expense to the Government as a result. The existing FAR clause as well as the existing FAR Part 45 do not directly address this, leaving it open to obvious misinterpretation.

Charles A. Waszczak

CHARLES A. WASZCZAK

2004-025-4

"Ralph Nash"
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Subject Comment

Attached is an article I will publish in the Nash & Cibinic Report in November. It contains a suggestion for the rewrite of Part 45. Ralph Nash TAXING OVERHEAD PROPERTY.POSIII.wpd

2004-025-4

• POSTSCRIPT III: Title To Overhead Items • Another shoe has dropped in the saga of the defense industry's efforts to avoid state taxation by claiming (successfully so far) that the Government takes title to property charged to overhead on cost-reimbursement contracts and fixed-price contracts where progress payments are based on costs incurred. We won't repeat our argument that the Department of Defense has never has claimed title to such property in *Title to Overhead Items: Confusion Between Accounting Rules and Ownership of Property*, 13 N&CR ¶ 55, *Postscript: Title to Overhead Items*, 16 N&CR ¶ 19, and *Postscript II: Title to Overhead Items*, 17 N&CR ¶ 57, but merely add the new occurrence.

The Proposed Change To The Federal Acquisition Regulation

The long-awaited proposed revision of Part 45 of the FAR dealing with Government property was issued in 70 Fed. Reg. 54,878, September 19, 2005. As expected, it simplifies and clarifies this old, complex regulation. With regard to title to property bought by a contractor to perform Government contracts it contains a nice, straightforward statement in proposed FAR 45.401:

> (c) Under cost-type and time-and-material contracts, the Government acquires title to all property to which the contractor is entitled to reimbursement *as a direct item of cost*, provided the property acquired is reasonable, allocable, and allowable (see Part 31). If the contractor is covered by Cost Accounting Standards, its disclosure statement may affect the charging, and consequently, the title vesting provisions. [Italics added]

There is no indication in the description of the proposed changes that this is a new rule being adopted by the FAR Council. It is clearly a clarification of the old clause. See John's discussion in

2004-0254

16 N&CR ¶ 19 and 13 N&CR ¶ 55. It makes it crystal clear that the Government does not intend to claim title to property bought with overhead funds.

If there were any doubt of this, the proposed Government Property clause in FAR 52.245- 1 is just as clear. It states:

> (e) *Title to Contractor-acquired property*. Title to all property purchased by the Contractor, for which the Contractor is entitled to be reimbursed *as a direct item of cost*, under this contract, shall pass to and vest in the Government upon-- (1) A vendor's or supplier's initial delivery of such property to the Contractor; (2) Issuance of the property for use in contract performance, including the installation of parts through normal maintenance; (3) Commencement of processing of the property for use in contract performance; or (4) Reimbursement by the Government for the cost of the property, whichever occurs first. [Italics added]

The frightening aspect of this clarification is that during the time that it was being considered by the FAR Council, the Department of Defense had one of its employees submit an affidavit to the court in Texas stating that it was the Government's policy to take title to property bought with overhead funds. In 17 N&CR ¶ 57 John included the quotation from the opinion that indicates that the court relied heavily on this "evidence." See Wyatt, *The "Three Musketeers" of Opverhead Property: Motorola, Hughes, and Raytheon Cases*, 3 Journal of Contract Management 23 (2005), quoting the affidavit and arguing that it was inconsistent for the Government to propose this revised regulation in the face of the testimony before a court. We would, of course, reach the opposite conclusion – that it was not only inconsistent but reprehensible for the Government to submit the affidavit knowing that it did not interpret the clause as taking title to property bought with overhead funds. The fact that the affidavit deprived the state of Texas of at least $ 250 million in revenue makes this no laughing matter.

2004-025-4

Progress Payments Based On Costs

Apparently the FAR Council doesn't realize that the title provisions in the Progress Payments clause in FAR 52.232-16 have also created confusion and have led to the courts' rulings on state taxes. See 16 N&CR ¶ 19. Had they been aware of this, they surely would have clarified that clause as well. But they didn't. As John noted in his Addendum to 16 N&CR ¶ 19 this leaves the state tax problem half solved and that is a very unsatisfactory solution. It's time to clean this mess up once and for all. RCN

2004-025-5

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Subject Comment - Ref 52.245-1(f)(iii)

Ref 52.245-1(f)(iii):

Discussion: As written, this paragraph creates a potential risk for the government through use of the phrase "all Government property accountable to the contract". For instance, in a logistics services type operation where receipt, storage, loan, and issue of government property on a continuing basis is a primary function of the contract, the contractor would not be required to maintain records of the property that was not specifically furnished to the contractor under the contract.

Recommendation: That the phrase "all Government property accountable to the contract" be rewritten to "all Government property in the contractor's possession, regardless of value".

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2004-026-6

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Subject Comment - Ref 45.107(a),(b); 52.245-1,2

Ref 45.107(a),(b); 52.245-1,2:

Discussion: As written, there does not appear to be a provision for concurrent use of both the 52.245-1 and 52.245-2 clauses for different types of property provided under a single contract. In practice, there are many cases in which both numerous items of standard COTS equipment that is readily available to contractors and could therefore be provided under the provisions of 52.245-2 as well as numerous items of Unique Federal property (previously APP) and Sensitive property that is not readily available to contractors and which the government intends to retain are provided under a single contract.

Recommendation: That the subject clauses be crafted in such a manner as to provide for the concurrent use of the provisions of both 52.245-1 and 52.245-2 within a single contract vehicle, or alternatively, that verbiage be added clarify that these clauses are not intended to be mutually exclusive, with the provision that property subject to each clause be separately identified in the contract.

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Subject Comment - Ref 45.101, Definition of "Equipment"

Ref 45.101, Definition of "Equipment":

Discussion: The phrase "complete in-and-of itself" would appear to limit the application of a systems concept to property management in that it would preclude an assemblage of individual component items that are utilized together to perform a specific function from being identified as a single item. If this is the intent, it has the potential to result in a significant additional amount of work both on the part of government and contractors to manage each component item individually. Additionally, there exist certain instances in which property may be furnished without part or all of its associated auxiliary or accessory items when those items are not required for the specific purpose for which the property is furnished. This would also appear to be precluded by the proposed definition. If this is the intent, it has the potential to result in a significant amount of cost to the government to obtain additional items to result in a "complete" item of property, when those items are in fact unnecessary to the intended use of that property.

Recommendation: That the phrase "complete in-and-of itself" be replaced with the phrase "functionally complete for its intended purpose", or alternatively, the phrase "in-and-of itself" be deleted.

Discussion: In the second sentence, the phrase "generally has an expected service life of one year or more" would seem to be superfluous. If an item is in fact durable or nonexpendable, service life should not be an issue. Additionally, the phrase "does not ordinarily lose its identity or become a component part of another article when put into use" creates additional confusion and is redundant based on the definition of Material. This distinction should be based upon the intent of furnishing the item - an item that would otherwise be considered as equipment should only be considered to be material if it is in fact furnished for a specific use that will cause it to lose its identity or become a component part.

Recommendation: That the second sentence be deleted in its entirety, or alternatively, simplified to "Equipment does not lose its identity or become a component part of another article when put into use."

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Subject Comment - Ref 52.245-9(a)(2)

Ref 52.245-9(a)(2):

Discussion: As written, does not provide for the use of original acquisition cost when such cost can be readily determined for property not identified in the contract

Recommendation: That the phrase "the original acquisition cost, if it can be determined, or if it cannot be determined", be inserted between "or in the absence of such identification," and "the fair market value attributed to the item by the Contractor."

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Subject Comment - Ref 45.102:

Ref 45.102:

Discussion: As a result of the A-76 process, contracts have been crafted that provide GFP to a contractor for other than the use of the contractor, i.e., where the items are provided GFP in the contract for the sole purpose of being loaned back to the government for actual use. Under existing FAR, and in the proposed rules, this scenario is not anticipated and results in significant difficulties maintaining a proper chain of accountability from the government to the contractor and subsequently back to the government. As the government's ability to hold the contractor liable for loss that occurs while the GFP is in the possession of the contractor is limited, and in any case there is no provision for the contractor to flow responsibility back to the government, this creates a scenario for significant risk of loss without accountability or liability.

Recommendation: That procedures be added for flow of accountability from a contractor back to the government, with the government subject to its standard internal control methods, and the government individual/organization with possession of the GFP having pecuniary liability for the property. Alternatively, that clarification be added (here or elsewhere) that GFP provided to a contractor is for the sole use of the contractor (and subcontractors, where applicable) in meeting the requirements of the contract, and not to act as a repository for government property intended for actual use by the government.

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Subject Comment - Ref 45.101(b):

Ref 45.101(b):

Discussion: In many instances the Government has a requirement for utilization data to be maintained as part of its functional authorization process for the establishment of facilities and acquisition of equipment to support such authorizations. This paragraph would seem to discourage the maintenance of such utilization records such as those currently required by FAR 45.509-2(b)(2). Should a contractor adopt a voluntary consensus standard that does not provide for the maintenance of such information, the lack of such information would result in a significant hindrance to the government for making adequate determinations as to requirements.

Recommendation: That a requirement to maintain utilization data similar to that currently identified at FAR 45.509-2(b)(2) be reinstated.

John Roberts
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6607 NW Fort Sill Blvd, Bldg 455T
Fort Sill, OK 73503-1899
(580) 442-6901, DSN 639-6901

2004-025-5

"Roberts, John Mr"
<j.roberts@us.army.mil>
10/28/2005 09:09 AM

To farcase.2004-025@gsa.gov
cc
bcc
Subject Comment - Ref 45.105(b):

Ref 45.105(b):

Discussion: As written, requires the PA to provide a schedule for completion of correction of deficiencies. Where the PA is not intimately familiar with the day to day operation of the contractor's facility, this has a potential to result in the generation of an untenable requirement. This would likely result in a negotiation process, delaying the amount of time until correction was completed and as a result increasing the risk the the government.

Recommendation: Rewrite to provide the option for the PA to request that the contractor submit (by a specific date) a corrective action plan addressing the identified deficiences including a completion schedule, subject to PA review and approval.

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2004-025-6

"Roberts, John Mr"
<j.roberts@us.army.mil>
10/28/2005 09:10 AM

To farcase.2004-025@gsa.gov
cc
bcc
Subject Comment - Ref 45.301(b)(1):

Ref 45.301(b)(1):

Discussion: As written, this paragraph would appear to indicate that contractor use of government property other than that furnished under the provisions of the contract would not be subject to rental on a GOCO cost-plus-fee contract. In cases where a contractor on a GOCO cost-plus-fee contract is found to be utilizing government property other than that furnished under the contract, it would seem that rental should be appropriate.

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2004-025-5

"Roberts, John Mr"
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10/28/2005 10:16 AM

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Subject Comment - Property Records:

With the elimination of existing FAR 45.105 verbiage, it appears that it may now become necessary for the Government to maintain its own official property records separate from the Contractor's records of Government property, in order to meet the Government's internal record keeping requirements. If this is in fact the intent, it has the potential to result in the transfer of a significant amount of work that is currently performed by Contractors back to the Government. On the other hand, if the Contractor's records are still intended to serve as the Government's official property records, it would seem that the minimum requirements for those records should be clearly and concisely defined in the FAR both to aid the Contractor in ensuring that any voluntary consensus standard selected would meet the minimum record keeping requirements of the Government, and to aid the Government in determining the acceptability of the standard used by the Contractor.

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2004-025-6

"Randlett, Rodion C (US SSA)" <rodion.c.randlett@baesystems.com>

10/31/2005 03:45 PM

To farcase.2004-025@gsa.gov

cc

bcc

Subject COMMENT FOR CONSIDERATION FOR IN THE FORMULATION OF THE FINAL RULE FAR45 REWRITE

Dear FAR Secretariat,
Thank-you for this opportunity to submit this comment for consideration in formulation of the final rule regarding the FAR Part 45 Rewrite.

[FAR Case 2004-025]

Federal Acquisition Regulation; Government Property

ACTION: Proposed rule. [Federal Register: September 19, 2005 (Volume 70, Number 180)]
[Proposed Rules [Page 54878-54889

Comment for consideration in the formulation of the final rule

Recommend that at 52-245-1 (f) (iii) (A) (3) (Records of Government property) that the wording be revised to read:
(3) Unit acquisition cost (or reasonable estimate if definite unit cost cannot be obtained).

Reason: Obtaining an actual unit cost of minor contractor fabricated items that must be identified and controlled is at times not practical or possible. This problem is recognized for Government furnished property in the proposed rules at 45.101 (2) by acceptance of an estimated fair market value when the acquisition cost is absent.

Respectfully,
Rodion C Randlett, Mgr., Government Property Administration NCA4-3110
BAE Systems
P.O. Box 868
Nashua, NH 03061-0868
(603) 885-2370

2004-025-7

"Myers, Beth TACOM-WVA"
<beth.myers@us.army.mil>
09/21/2005 09:01 AM

To "'farcase.2004-025@gsa.gov'" <farcase.2004-025@gsa.gov>
cc
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Subject FAR Case 2004-025

Comment:

FAR 45.201 describes information that must be included in solicitations when furnishing of government furnished property is anticipated. Request that a clause be established to provide the information to be included in the solicitation or modify the current clause to include the information. By not providing a standard clause, each agency/installation must create their own clause in order to provide this information.

Beth Myers
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2004-025-8

"Olvera, Catherine Ms AFSC" <catherine.olvera@us.army.mil>

11/01/2005 04:36 PM

To "'farcase.2004-025@gsa.gov'" <farcase.2004-025@gsa.gov>

cc "'barbara.binney@us.army.mil'" <barbara.binney@us.army.mil>, "Harrison, Gene L Mr AFSC" <gene.harrison@us.army.mil>, "Johnson, Melanie A Ms

bcc

Subject FAR Case 2004-025 Federal Acquisition Regulation; Government Prop erty

1. Some contracting organizations set-up no cost property management contracts, the current part 45 specifically addressed facilities use contracts. HQ, AFSC currently utilizes numerous Facility Use and Consolidated Facility contracts at the Government-Owned Contractor Operated (GOCO) Army Ammunition Plants (AAPs) and at the Contractor-owned Contractor-operated (COCO) plants, respectively, that retain government owned equipment (GOE) and real property (at the GOCOs) for accountability purposes. The GOE and real property are used concurrently under multiple programs and contracts for the production of ammunition products for the Army, other Services, and foreign military sales customers. It is impractical and unrealistic to account for this GOE and real property under each and every separate production/supply contract since the work is, has been, and will continue to be produced concurrently. It is appropriate and prudent to continue with these property management contracts that can account for and authorize use of the GOE and real property. These types of contracts also allow for a central contractual vehicle to track the usage and rent for those instances when the GOE and/or real property are being utilized for third party sales.

2. The proposed rule eliminates the definition of facilities and facilities contracts along with the clauses. We think the proposed revisions make the application of the Government property more streamlined. However, we need to ensure that along with this flexibility it is clear that there is nothing to prohibit the use of a property management contract.

3. Therefore, we recommend that under the subpart 45.000. Scope of part - adding a sentence to clarify, "That nothing in this part prohibits the use of a property management contract".

2004-025-9

"Hughes, Katherine (HHS/OS)" <Katherine.Hughes@hhs.gov>

11/04/2005 03:33 PM

To "'farcase.2004-025@gsa.gov'" <farcase.2004-025@gsa.gov>

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Subject Comments on FAR Case 2004-025

HHS submits the following comments on the subject FAR Case:

45.101, Definitions

(1) ". . .consistently applied sound accounting principles." The accepted term is "generally-accepted accounting principles (GAAP). Do cost accounting standards apply to property accountability? If so, then this definition should expand to allow for CAS.

Definition of "demilitarization" uses "demilitarization" as part of the definition. If we do not know what the word means, how does this definition help us?

Under definitions, "sensitive property" should include sensitive and classified information.

If "personal property" is not defined elsewhere, it should be defined in 45.101.

45.103(a)(2)is a compound sentence whose halves do not appear to relate to each other. Recommend splitting this subparagraph into two.

45.103(a)(5) requires contractors to justify keeping GP not required for performance of a Gov't contract. What justification could a contractor provide?

45.104(b) What does "revoke the Government's assumption of risk" entail? Why would this compel compliance?

45.107(a)(1)(i) requires insertion of GP clause in all cost reimbursement, T&M, and LH solicitations and contracts. If GP is not involved, why is the clause required? Consider especially service contracts where property is not involved or where the contractor supplies all required property.

Thank you for the opportunity to provide comments on this case.

Kathy Hughes
HHS CAAC Representative
(202) 690-7079
e-mail address: Katherine.Hughes@hhs.gov

2004-025-10

FAR Rewrite Concerns for No. 2004.025.

I have reviewed the FAR proposed changes (FAR 45).

The following are my concerns:

a. Leading Standards (For whom) Large Contractors, Mid Size Contractors or the small contractors. Standards for Large Contractors should not be the same for small. This will put an unnecessary burden on them as well will increase Governments cost. Any or all changes to procedures, etc. that are currently being performed will add cost to the Government. Who sets the "Leading Industrial Standards".
b. FAR45.101 (Contractor acquired property change title at end of definition to: "provided funding or has title". Gives a clearly meaning to Contractor Acquired Property.
c. FAR45.101 Should include a definition of "WIP".
d. Subpart 45.5 (b). This needs more clarification as to what resolution the Contracting Officer can do if a Prime Contractor does not agree to allow the support property administration.
e. Part 52, 52.245-1 (Definitions). Should add definitions for Cannibalization and WIP.
f. More explanation of how or what is need for Contracting Officers to document the decision to provide GFP to the contractor. (i.e must each item be listed and reason for provided the property as GFE). What is are reasons for providing property that are acceptable?

Submitted by:
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2004-025-11

"Goetz, Douglas"
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11/07/2005 03:55 PM

To farcase.2004-025@gsa.gov
cc
bcc
Subject FAR CASE 2004-025

Dr. Douglas N. Goetz

General Services Administration
Regulatory Secretariat (VIR),
1800 F Street, NW, Room 4035,
ATTN: Laurieann Duarte,
Washington, DC 20405.

7 November 2005

Dear Ms. Duarte:

I apologize for not providing all comments under one cover letter. But as one reads and analyses the proposed rules other items appear – that before were not visible. So, with that in mind I have a few additional comments:

1. In FAR 45.000, New Second Sentence – delete the word "PLANT." The rule eliminates the concept of "plant" equipment leaving just "equipment." It appears that this is an administrative oversight.

2. In FAR 51.106 there is a reference to an "old" clause that this proposed rule eliminates. Therefore it will be necessary to fix the clause number to reflect new clause number, i.e., change it to 52.245-1.

3. Under the proposed policy at FAR 45.107(b) specifically the prescriptive language for the use of the Installations clause, 52.245-2. As a major contributor to this clause, my original intent was for use ONLY under Fixed Price Contracts. It is inappropriate for use with Cost Reimbursement type contracts. Therefore, it is requested that language be added informing the contracting officer that "This clause should be used ONLY with Fixed Price contracts."

4. I believe that there is a small problem with the definition of "Property Administrator" – a couple points here:
a. If the Plant Clearance Officer is defined in FAR Part 2.101, shouldn't the Property Administrator ALSO be in FAR 2.101? I believe that it would be appropriate to have BOTH located in FAR 2.101 vis-à-vis one in FAR 2.101 and one in FAR 45. It maintains consistency.
b. The two definitions need to read identically, except for the responsibilities, i.e., "The PA/PLCO means an authorized representative APPOINTED to..., Versus ASSIGNED. Since a PA and a PLCO must have a "Certificate of Appointment" there is

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logic to use the word "appointed" in BOTH places.

5. There is no direction for Granting "Relief of Responsibility.
a. There is "implied" direction under 52.245-1(f)(vii)(A) – but that is direction to the contractor.
b. There is NO direction under FAR 45 – and I am concerned that there will be confusion over WHO has the AUTHORITY to grant relief. This authority has vested in the Property Administrator for decades and the process has worked quite well.
c. Therefore, I would recommend that a new Para (c) be added to 45.104 which will read, *"When the PA determines that a reported case of loss, damage or destruction of Government property constitutes a risk assumed by the Government the PA shall notify the contractor in writing that they are granted relief of responsibility in accordance with 52.245-1(f)(vii) as the risk of loss is the responsibility of the Government." Where the PA determines that the risk of loss is not assumed by the Government, the PA shall forward a recommendation requesting that the contracting officer hold the contractor liable."*

If you require further information, comment or explanation of any of my comments or suggestions I would be glad to provide assistance. I can be reached by phone at my work number of 937-781-1077 or by e-mail at Douglas.Goetz@DAU.MIL.

Respectfully submitted,

Douglas N. Goetz, Ph.D.
Professor of Contract and Property Management
Defense Acquisition University

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FAR REWRITE COMMENTS 2.pdf

2007-025-1-2

Dear FAR Council:

Below please find my comments – I have also included them as an attached pdf file.

Thanking you in advance,
Dr. Douglas N. Goetz

Dr. Douglas N. Goetz

General Services Administration
Regulatory Secretariat (VIR),
1800 F Street, NW, Room 4035,
ATTN: Laurieann Duarte,
Washington, DC 20405.

Dear Ms. Duarte:

I greatly appreciate the opportunity to comment on the Proposed FAR PART 45 and the applicable clauses. Having worked on numerous committees and efforts over the past decade to accomplish this task I must congratulate you on these efforts. The current existing FAR Part 45 had numerous areas in dire need of correction and improvement. I believe that many of these deficient areas have been addressed in this rewrite effort. For that I am most grateful – and commend your efforts.

I would like to first provide comments in regard to the Government Property clause, then address the requirements of FAR Part 45, and lastly the elimination of a number of Government Property related clauses that are proposed for elimination. Where I have made suggestions regarding the wording of a sentence I have done so by italicizing the word(s) to delineate the suggested change.

THE GOVERNMENT PROPERTY CLAUSE – 52.245-1

1. FAR 52.245-1, the Government Property clause.
   a. Paragraph (b) entitled "Property management" provides a wonderful framework for a property management system – and I commend the committee for their efforts in this paragraph.
      i. There is one weakness due to historical use of a word that has become a standard industry practice in all "Systems" type applications, not just in this property system. That word is "Procedure(s)." ISO, a quality standard that is

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accepted and consistent throughout the world applies a "Systems" approach to quality – and yet ISO is quite specific in its application through "Procedures." For clarification it is recommended that the word "procedures" be added to paragraph (b)(1) -- the third sentence to now read "*In doing so the contractor shall initiate and maintain the processes, systems, **procedures**, records and methodologies….*"

ii. Another concern in regard to the use of Voluntary Consensus standards (VCS) and Industry Leading Practices (ILP) as set forth in (b)(1). I commend the committee for inclusion of these new opportunities and requirements to define the world of Property management. And though I support this concept one needs to be aware that other "drivers" exist out side of VCSs and ILPs. It has already been brought to my attention with a number of VCSs conflicts with other requirements, e.g., a VCS on administrative control of assets with a statutory rules on Arms, Ammunition and Explosives and statutory rules on environmental issues. Therefore, to ensure that the world of Government Property does not run afoul of the law it is requested that the last sentence of paragraph (b)(1) be amplified to read "… consistent with voluntary consensus standards, industry-leading practices and standards for Government property management *except where inconsistent with law or regulation."*

b. Paragraph (c) of the Clause entitled Use of Government property uses a problematic word – "cannibalize." Many people have their own preconceived notions of what constitutes cannibalization. Used in this clausal context it is nebulous and vague. Therefore, it would be wise and prudent to include a Definition of this term in the clause to prevent confusion. There are numerous definitions found in DoD regulations that could be used including those found at: DoD 4160.21-M, AF Policy Directive 21-1, and the Joint Services Regulation of Army Regulation 735–11–2DLAI 4140.55SECNAVIST 4355.18AAFJMAN 23-215, which also address the FINANCIAL implications of such actions. The DoD Disposal Manual's definition reads *"Cannibalize. To remove serviceable parts from one item of equipment in order to install them on another item of equipment. The removed item shall be replaced."* This version of the definition would need to be modified as in many instances the removed item is NOT replaced – rather the carcass is scrapped. Therefore,

the committee would need to temper the definition as it applies to the world of Government property in the possession of contractors.

c. Paragraph (d) entitled "Government furnished property (GFP)" could use some further clarification and amplification. The clause discusses the "warranties" the Government makes in regard to GFP, including the issues of suitability for use and timely delivery. Quite clearly the Government bears these responsibilities when it directly furnishes GFP to the contractor.

i. Yet, there are many instances where the contractor ACQUIRES property, which upon contract completion or other event is converted to GFP generally through transfer to another contract with the same contractor. It would appear to be problematic for the contractor to have acquired this property originally as CAP, or even fabricated it for said Government contract, and then process it through their inspection system – only to, upon its transfer to another contract as GFP, claim that it was not "suitable for use." Yet, such is a potential consequence of the proposed rule.

ii. It is recommended that additional language be added to this paragraph of the clause that states *"The warranties of suitability of use and timely delivery of Government furnished property do not apply to property acquired or fabricated by the contractor as contractor acquired property and subsequently transferred to another contract with this contractor."* You would need additional language to clarify this change in FAR 45.106, Transferring Accountability, for the direction of the Contracting Officer and Government.

iii. Another issue that needs to be clarified is in regard to the paragraph (d)(3)(ii). Under the proposed language the contractor is required to inspect the property upon RECEIPT and then, within a reasonable period of time, notify the government of a "not suitable for use condition." There are numerous instances where property is received and CANNOT be inspected, i.e., Machinery that requires INSTALLATION and "Powering up" before a determination of suitability can or may be made. It is recommended that additional language be added to the paragraph similar to the current facilities clause language (FAR 52.245-7(l)(2)) entitled

025-11-2

"Representations and Warranties." This paragraph requires the contractor to notify the Government within 30 days of "RECEIPT AND INSTALLATION" of the equipment. In the proposed clause the language under paragraph (d)(3)(ii) could be modified to read "In the event *Government furnished* (Note – I changed this to GFP from property as property is too broad of a term) property is received by the Contractor, *or for Government furnished equipment after receipt and installation,* in a condition not suitable for its intended use, the Contracting Officer…."

d. Paragraph (e) entitled "Title" appears to be lacking a "condition" for application. It appears that under ANY type of contract the Government takes title to property charged direct. The policy under FAR 45.401 correctly states the intent of the Government. Unfortunately, the language in the clause reads far more broadly with NO discussion that the title provision only applies to Cost Reimbursement or Cost Sharing contracts.

i. It is recommended that the language in paragraph (e) be amended to read *"Under cost reimbursement, and cost sharing contracts* title to all property purchased…." This would clarify the application of the Title provision to the Cost world vis-à-vis the Fixed Price environment. Unless the Government intends to take title to all Property under both Fixed Price and Cost Reimbursement contracts it is recommended that we use language that clearly limits the clauses TITLE application to cost reimbursement contracts.

ii. In addition, with the emergence of greater use of Time and materials contracts an additional clarification is required in this contracting environment. T&M contractors have been found to have acquired equipment under T&M contracts charging it directly to that Government contract. This has been discovered to be an on-going problem due to the nature of that contracting process. Certainly this is not the anticipated outcome of this contractual vehicle. An additional sentence should be added to the title paragraph clarifying that *"when this clause is used with T&M contracts contractors shall only acquire material for direct charge to the contract."* (As the name implies)

e. Paragraph (f) of the clause deals with contractor plans and systems. It also does an excellent job in bringing

together a number of disparate regulations. There are a few items that require further clarification to make this an even better document.

i. Paragraph (f)(1). I need to reemphasize the criticality of including PROCEDURES in this discussion. I have already heard contractors discussing that they no longer need written procedures – just a plan and system. A plan and a system are inadequate without the written procedures that create a baseline for APPLICATION. Once again, this is standard industry practice, even more so in the government as we have written procedures for everything, and, as a voluntary consensus standard -- an ISO requirement. I would recommend that the first sentence of this paragraph (f)(1) be modified to include "property management plans, systems *and procedures,* at the contract.... Please note that in Paragraph (g) of the clause you allow the Government access to the contractor's premises... for the purposes of... evaluating the Contractor's property management systems, PROCEDURES, records.... Also in FAR 45.103(b) you address the requirement for PROCEDURES. Therefore it seems to have some logic to specify the requirement for PROCEDURES in the clause at Paragraph (f)(1) to ensure consistent application.

ii. Paragraph (f)(1)(ii) entitled "Receipt of Government property" has a number of processes embedded within it – including the receiving of Government property, the Identification of Government property and the handling of discrepancies incident to the receipt of Government property. The issue in this paragraph is with the concept of IDENTIFICATION in that it may take on two different perspectives: 1. – the visual act of looking at an asset and determining that it is Government property as it enters the contractor's premises and stewardship and 2. the PHYSICAL act of identifying an asset. While under the current FAR there is a concrete requirement to address this latter issue, no such requirement is imposed under the proposed rule. Under the current rule at FAR 45.506, a number of requirements exist. These include the visual act of identifying the Government property – but also include the requirements of MARKING the Government property with a indication of Government

025-11-2

Ownership, for some classes of property – a Serial Number, and the overarching concerns of the identification being securely affixed, legible and conspicuous.

1. The historical aspect of the first requirement of an indication of Government ownership was in an attempt to prevent and preclude unauthorized use. If the worker on the floor does not have a clear indication that an asset is Government owned – there is a higher probability of unauthorized use, making the contractor liable for penalties under the Uses and Charges Clause, FAR 52.245-9. Though we may assume that a contractor will physically identify the Government asset(s) – in all practicality the contractor may not physically identify (directly mark as Government owned) the asset due to the potential different interpretations of the requirement. This paragraph could be easily corrected and clarified with an addendum to read, "*physically identify the property as Government property with an appropriate identification, e.g., stamp, tag or mark or other identification that is legible, conspicuous and securely affixed.*"
2. The second issue is that of a serial number. Serial numbers are random and varied amongst the thousands of defense contractors, let alone the entire contracting world. Though we generally do not require the contractor to use a specific numbering system for items used during the life of a contract (Though for some items we do for configuration control – mostly deliverables), some form of numbering system is critical. This requirement should be added to the clause as part of a proper identification system. Some suggested language to allow for flexibility, "*Contractors shall have a consistent identification numbering system for all Government owned equipment, special test equipment and special tooling. If Items are contained in a standard agency identification system the contractor may use that identification number, in lieu of creating a new number.*"
Please note that the UID requirement DOES NOT suffice in this application as serial

numbers ARE applied to a multiplicity of items below the current UID threshold of $5,000, e.g., just turn over your laptop computer as an example.

iii. Paragraph (f)(1)(iii) entitled "Records of Government property" requires a bit of clarification under paragraph (f)(1)(iii)(B). This paragraph discusses an old property management technique for MATERIAL that is commonly referred to as a "Receipt and Issue" system. Paragraph (B) carries this system over to the new rule – but it appears awkward and incomplete to the non-property person. I would add a heading to this paragraph of "*Use of a Receipt and Issue System for Government Material* ." In addition, I would modify the word "formal" as used in the paragraph to either "*stock record* " or "*perpetual inventory property records* ." The use of the word "formal" begs the question – what is a formal record versus an informal record? While the terms "*stock record* " or "*perpetual inventory property record* " are found in numerous commercial material management texts and references – as well as the Current FAR under FAR 45.501 – stock record.

iv. Paragraph (f)(1)(vi) entitled "Reports" requires a bit of clarification under paragraph (f)(1)(vi)(B), (C) and (D)." Sub-paragraph (B), (C) and (D) of this paragraph discuss not so much a REPORT or Reporting Requirement imposed upon the contractor – rather it is DIRECTION to the contractor in the handling of Government property that has been damaged or destroyed. As such I would recommend that ALL of Sub-paragraphs (B), (C) and (D) be moved to Paragraph (h) as a NEW Paragraph (2), (3) and (4) under this heading and renumber the existing Paragraph (2) to a new Paragraph (5).

v. Paragraph (f)(1)(viii) entitled "Utilizing Government property" has three processes embedded within it – Use, Consumption and Storage.

1. One critical process that has been omitted from the proposed rule is that of movement. In point of fact, during movement the risk of loss, damage and destruction of Government property is at its greatest. A perfect example of this was the $500 Million dollar satellite located at a defense contractor site that in the process

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was NOT properly moved such that over $130 million dollars of damage was caused in that internal move process. The Government was responsible under the existing Government property clause for that "loss, damage and destruction" and the issue of whether the contracting agency has the money to repair or make this satellite usable is still ongoing. Though we call out "utilize" and "consume" and "store" Government property – we make no mention of controlling the process of moving that Government property – either internally through a move ticket or externally through a shipping document. It is recommended that the process of movement be added to Paragraph (f)(1)(viii) as follows "*The Contractor shall utilize, consume, move and store Government property....* "

2. The second issue that requires resolution within the proposed rule is the concept of "commingling." Under the current FAR there is a rather strict prohibition regarding the commingling of Government property with other property. This primarily applies to material where through the commingling process Government owned material loses its identity as to ownership. As such, when a contractor consumes material and it fails in test, the logical solution is for the contractor to claim that it was Government property – though this would be impossible to prove. Therefore commingling of material should be allowed only under very limited situations – one of those being the Material Management Accounting System (MMAS) authorized under DFARS 252.245-7004. In this situation Government owned material MAY be automatically commingling, without the Property Administrator's approval. Why? Because the MMAS has a requirement for the contractor to establish an algorithm to assign a proportional share ratio for all of the commingled material such that the Government does not bear all of the risk of loss, even for contractor owned material. This is a very efficacious process. There fore I

025-11-3

would recommend the following language be added as a new paragraph under (f)(1)(viii) new (B) – *"Unless otherwise authorized in this contract or by the Property Administrator the contractor shall not commingle Government property with property not owned by the Government."*

vi. Paragraph (f) Contractors Plans and Systems. This section does a wonderful job bringing together what previously was a disjointed fragmented requirement. Realizing that under the proposed rule that contractor's Property Management System(s) is/are no longer "Approved" by the Property Administrator -- caution is urged in leaving a contractor to act wantonly in regard to that system. In other words, there should be a requirement for the contractor to notify the Government prior to making any changes to the system that has been found to be adequate or compliant with the terms and conditions of the contract. No such requirement exists in the proposed language.

1. Though it is understood that we do NOT want the contractor's system to be a stagnant, static system but rather a vibrant changing, constantly and continuously improving system – that should not be done at the cost of wanton disregard for good systems management.
2. With that in mind there are numerous other examples, where even though the "system" was NOT approved (Nor disapproved) there is a Government requirement that the contractor NOTIFY the Government prior to making any SIGNIFICANT changes. This would alleviate the concerns that EVERY change, no matter how small, would need to be reported. The best example and one closest to property that I could find was the Material Management Accounting System (MMAS), DFARS 252.242-7004. This system is neither approved nor disapproved – similar to the proposed property system concept. But the writers of the MMAS were wise enough to realize that even the best systems, left unwatched, could be problematic. The MMAS has a notification requirement under the clause at 252.242-7004(c) entitled Disclosure and

Maintenance requirements. It states "The Contractor shall -- (3) Disclose significant changes in its MMAS to the ACO at least 30 days prior to implementation." The term significant is and can be broadly interpreted – but I believe that it allows the contractor and the Government sufficient flexibility to apply this rule. Certainly if it is good enough for the MMAS (And other Governmnent system requirements) it should be applicable to systems that control hundreds of billions of dollars worth of property owned by the Government. Since the ACO is the final say in the MMAS this requirement could be easily tailored to the Contractor's PMS where the PA has authority. Therefore, it is recommended that a new paragraph (f)(1)(E) be created that reads "*The Contractor shall disclose significant changes in its PMS to the Property Administrator 30 days prior to implementation.* "

f. Paragraph (g) deals with the Government's "Systems Analysis" of the contractor's operation. The proposed clause states, "The Government shall have access to the Contractor's premises, at reasonable times, for the purposes of reviewing, inspecting and evaluating the Contractor's property management systems, procedures, records, and supporting documentation." Though implicit within this paragraph is the requirement to allow the Government access to the GOVERNMENT PROPERTY – no where this is an EXPLICIT requirement. It is recommended that additional verbiage be added to read ""The Government shall have access to the Contractor's premises *and all Government Property* , at reasonable times…."

FAR PART 45

2. FAR Part 45 Comments:

a. FAR 45.101 – "Contractor Acquired Property." The term has been cited as confusing for decades. Contractor Acquired Property (CAP) has been misconstrued to be property OWNED by the Contractor. The term could be better entitled "Contractor Acquired *Government* Property" clearly describing, in its title, that even though the contractor is acquiring it – it is Government Owned – Government Property. Note – this would require a number of name changes in the Clause and the Regulation.

b. FAR 45.101 – "Property." Though this definition has

been in existence for decades, it too is incomplete in today's technologically driven society. Software, data, and source code are becoming more and more embedded within out society – and the procurement process.

i. Much discussion has arisen regarding "Is software acquired by the contractor Property and Government Property as defined in FAR Part 45?" It would provide clarity to both the working Contractor and Government employee if a statement were made that, "*For the purposes of this FAR Part software is not considered Government Property and is not controlled in accordance with this clause. Other clauses direct the management of software and data acquired or produced under Government contracts.* " Similar to what is done for progress payments and performance based payments – a statement of NON-INCLUSION as Government Property. Now, it is recognized that the definitional portion may not be the most appropriate location for this statement. As such, an alternate location is recommended at FAR 52.245-1(b) creating a new (4).

ii. My concern here is that no one has offered clarifying direction in this regard. This would be the perfect time to resolve that issue.

c. FAR 45.104. Responsibility and liability for Government property. This regulatory section requires a change to Paragraph (b). Paragraph (b) has two separate and distinct thoughts in it that should be divided. The first sentence deals with the revocation of the Government's assumption of risk. The second sentence deals with Prime and subcontractor risk of loss relationships. The two thoughts are disparate and should be two separate paragraphs (b) and (c).

d. FAR 45.105. Analysis of Contractor's Property Management System.

i. I would re-title this paragraph since it is really not addressing ONLY the Analysis of the Contractor's PMS. Rather this section addresses the Analysis *and CORRECTION* of a Contractor's PMS..

ii. The more critical concern with this section is the removal of the formal notification to the contractor on the Government withdrawal of the assumption of risk. This action is NOT to be taken lightly nor tossed off as a simple act. Under the current rule this notification MUST be done by

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certified mail, addressed to the contractor's managerial personnel – see FAR 52.245-2 (Alt. I) (g)(4)(i) and 52.245-5(g)(3)(i). This action, this step is CRITICAL to protect the Government's best interests. The use of Certified Mail is found in numerous locations through the FAR and DFARS. These cites include: FAR 3.705, FAR 11.403, FAR 19.302, FAR 33.211, FAR 49.102 and DFARS 222.406-8, DFARS 249.109-7 to list just a few instances. A number of these instances do not bear the same financial impact as the withdrawal of the Government's assumption of risk where it may potentially impact a contractor for BILLIONS of dollars worth of Government property in a contractor's possession, e.g., Raytheon in Arizona, Lockheed Martin in Fort Worth Texas, and many other contractors. It is respectfully requested that Paragraph (c) be modified to include the requirement for notification by Certified Mail.

e. FAR 45.107 Contract clauses.

i. Paragraph (c) addresses the use of the "Uses and Charges Clause," FAR 52.245-9. I agree with the committee in requiring the use of the clause when rental of Government property is contemplated. I would recommend that the clause become MANDATORY for all contracts that furnish Government Property or authorize the acquisition of Government property.

1. More Specifically, I would require it as a mandatory clause under all Cost reimbursement type contracts and any Fixed Price contract that requires the use of 52.245-1.
2. It would NOT be necessary for use under Time and Material contracts as the only property to be acquired under that type of contract would be material – where the charging of rent would be inappropriate.

ii. I would respectfully request that the Committee consider adding language regarding the use of the Government Property clause in FAR Part 12 contracts. Currently, we are seeing an explosion of FAR Part 12 contracts that furnished or even authorize the acquisition of Government property – some even containing cost reimbursement line items within the FAR Part 12 contract. I do not believe it of value to argue whether or not these are

legitimate FAR part 12 contracting actions – only that it is happening. As such a direction could be included here as a new subparagraph under 45.107(a)(1)(iii) to be read in concert with the previous reference Stating *"FAR Part 12 contracts where Government Property that exceeds the simplified acquisition threshold is furnished or where the contractor is directed to acquire property for use under this contract that is titled in the Government."*

f. FAR 45.501 Support Government Property Administration. Though the Support Property Administration function has been a well documented and accepted practice, it is my belief that the discussion of this process is inappropriately located in FAR Part 45.

i. If it is going to provide direction to the Contractor – then it belongs in the Government Property clause. Nowhere in the clause is there ANY discussion regarding Support Property Administration and the contractor's actions either to request this or to agree to it. It would be appropriate to include language in FAR 52.245-1(f)(1)(v) entitled Subcontractor control. A new Paragraph (C) could be incorporated at this cite which would address the issue of a Support Property Administration. *"Though it is the contractor's responsibility to properly administer and manage its subcontracts and subcontractors, the Government may provide Government property oversight at a subcontractor location through the Support Property Administration process, when the conditions in FAR 42.202(e) are met. The prime Contractor shall request the assistance of its cognizant Property Administrator in writing when Support Property Administration is desired . The Government may also request the permission of the prime contractor to perform the support property administration function at any of its subcontractors possessing Government property accountable under its contracts."*

ii. In FAR 45.501(b) it appears that the Property Administrator reports to the Contracting Officer if the Prime contractor does not want the Property Administrator to be perform a Support Property Administration role. I am confused – Why would the Government be upset with the contractor for doing the work it originally agreed to do? For me to completely understand this paragraph I would require further detailed information. Not

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having that information, I would request that paragraph (b) be deleted.

OTHER GOVERNMENT PROPERTY RELATED CLAUSES

3. PROPOSED ELIMINATION OF THE SPECIAL TOOLING CLAUSE.

a. I read with interest the Government's request regarding the potential elimination of the Special Tooling clause, FAR 52.245-17. I would support the elimination of the 1989 Version of the ST Clause that is in the current version of the FAR. I **DO NOT** support the elimination of the 1984 Version of the ST clause that the Department of Defense is using through a Deviation that has been in force and effect since 1990.

b. The Special tooling Clause, often referred to as the "Right to title special Tooling Clause" is a very useful contracting tool and a valuable cost savings vehicle to the Government. The Purpose of this clause is very specific – in Fixed Price Negotiated contracts, where the Government negotiates with the contractor for a deliverable end item, the contractor will invariably build in through their negotiations, costs for UNIDENTIFIABLE Special Tooling (ST). The Contractor knows through their estimating and engineering system(s) that they will need ST for this contract. But, at time of contract award the ST is unidentifiable to EITHER the Government or the contractor. If the ST items WERE identifiable, then they would be listed as a LINE ITEM or CLIN in the contract. But they are not. Yet, the Government pays for and funds the contractor for that UNIDENTIFIABLE ST. If this clause is deleted as a FAR clause – then the Government is giving up millions of dollars of procurement funds paying for ST that the contractor will now own and could then use to limit its future competition – even though the Government paid for the ST. The ST Clause allows the Government to exert its "Right" to claim title to that previously unidentifiable ST, which is now KNOWN at the time of contract completion. Using this option the Government now has Government owned ST, that it paid for through the negotiation process, which it can use to further enhance its competition for various weapon systems. In the hands of smart contracting officers this clause is extremely valuable to the Government.

c. It is recommended that the ST clause be retained for use by the Government. Numerous major Fixed Price programs use the ST clause very effectively – the F-16 program with Lockheed Martin in Fort Worth Texas being a perfect

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example.

d. In point of fact, there was a previous DAR case that Merged the "Right to title concept" for both Unidentifiable ST with unidentifiable Special Test Equipment (STE). Producing a clause whereby the government paid for the option of taking title to BOTH ST and STE, at the decision of the Government contracting Officer.

e. If we fail to incorporate a clause whereby the Government does NOT have the right to title for ST or STE under Negotiated contracts where monies have been included then I would respectfully request that the costs of unidentifiable ST or STE be handled as an overhead expense vis-à-vis the Government paying for it under the negotiations and obtaining no benefit from the funding.

4. My last concern is with the elimination of Facilities contracts. If it is decided that all facilities contract direction and guidance is eliminated there are numerous other references that would need to be eliminated. I am sure that the committee is aware of these other references but some of these include, but are not limited to:

a. The references in
   i. FAR 4.804-2
   ii. FAR 14.502
   iii. FAR 22.405
   iv. FAR 23.704
   v. FAR 31.106
   vi. FAR 35.104
   vii. FAR 42.320(a)(30) regarding Facilities Contracts
   viii. FAR 43.205
   ix. FAR 51.107

b. The FAR clauses at:
   i. 52.216-13 and -14
   ii. 52.249-11

c. Numerous references in the DFARS including
   i. 204.7003 Basic PII number
   ii. 239.7402 Policy.
   iii. Numerous References in DFARS 245

5. Lastly, since the committee eliminated the definition of "facilities" from FAR Part 45 it will be necessary to include in FAR Part 2 a definition of facilities as the word is used thousands of times throughout the FAR with no definition provided.

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6. If you require further information, comment or explanation of any of my comments or suggestions I would be glad to provide assistance. I can reached by phone at my work number of 937-781-1077 or by e-mail at Douglas.Goetz@DAU.MIL.

Respectfully submitted,

Douglas N. Goetz, Ph.D.
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Defense Acquisition University

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2004-025-12

"Ruckdaschel, Tom, Mr, OSD-ATL" <Tom.Ruckdaschel@osd.mil>

11/09/2005 01:56 PM

To farcase.2004-025@gsa.gov
cc "'Saindon, Eric'" <Eric.Saindon@dcma.mil>
bcc
Subject FW: Tom's FAR comments

General Services Administration

Regulatory Secretariat (VIR),

1800 F Street, NW, Room 4035,
ATTN: Laurieann Duarte,
Washington, DC 20405.

Attached are my comments on FAR Case 2004-025

Thomas Ruckdaschel

DoD tomcoms.doc

2004-025-12

COMMENTS: Proposed Rule (FAR Case 2004-025)

45.104 Title to Government Property

Change as follows:

"Under fixed price type contracts, the contractor retains title to all property acquired by the contractor for use on the contract, *UP UNTIL THE TIME THAT SUCH PROPERTY IS RECEIVED, DELIVERED AND ACCEPTED AS A PART OF THE DELIVERABLE END-ITEM BY THE GOVERNMENT.*

Rationale: Greater clarity.

52.245-1, Paragraph (viii): *"...relieved of stewardship for Government property when such property is - (A) Consumed or expended, reasonably and properly, or otherwise accounted for, in the performance of the contract as determined by the Property Administrator, including reasonable inventory adjustments.'*

Change as follows:

"...relieved of stewardship for Government property when such property is -

(A) Consumed or expended, reasonably and properly, or otherwise accounted for, in the performance of the contract , including reasonable inventory adjustments of MATERIAL, AS DETERMINED BY THE PROPERTY ADMINISTRATOR; AND/OR A PROPERTY ADMINISTRATOR GRANTED RELIEF OF RESPONSIBILITY FOR LOSS, DAMAGE, DESTRUCTION OR THEFT."

Rationale: This recommended change makes the paragraph more comprehensive. It also allows for the proper and necessary distinction between true losses of equipment with normal physical inventory adjustments of material, e.g., nuts, bolts, washers, screws, etc. Surely we don't want contractors to provide us with the reports required in Paragraph (vi) Reports, for normal variation. If the PA suspects otherwise, he/she can still require the contractor to produce the report, write-up the contractor, etc.

45.101

Change definition of Equipment , as follows:

"Equipment. Tangible assets that are functionally complete for their intended purpose, durable, and nonexpendable. Equipment generally has an expected service life of one year or more; is not intended for sale; does not ordinarily lose its identity or become a component part of another article when put into use. "

2004-025-12

Rationale: Greater clarity

2004-025-13

"Dianne Blankenstein"
<blankenstein@prodigy.net>
11/14/2005 09:19 PM

To farcase.2004-025@gsa.gov
cc
bcc
Subject Comments on FAR case 2004-025

I have read with interest the proposed FAR rewrite case 2004-025. On the whole I believe it is a good idea, but as a tax payer I have some concerns in a few areas. I have read the ASTM standards and believe they are adequate to protect the interest of the Government in most cases, but somewhat lacking in others. In those areas I believe the FAR needs a little more guidance.

I do like the one property clause for both cost and fixed price contracts, and the fact the clause contains all the provisions to be applied instead of referring to and/or incorporating another portion of FAR the way the current clauses do.

I do wonder why the words adequate and inadequate are being changed from satisfactory and unsatisfactory, and why Agency Peculiar Property (once Military Property) is now being changed to Unique Federal Property. I don't understand what purpose that serves. Is it change just for the sake of change or will it really make a difference some how?

The ability of the Property Administrator to determine the time frame for correction of deficiencies in 45.105 is long over due. Putting a short time frame for systemic corrections on large contractors causes band-aid patches instead of permanent fixes. Very good!!!

I agree with the concept of changing "OPE" to equipment. Most people I know understand the term equipment, where "OPE", "IPE", and "Facilities" were confusing to the majority of non-property people. I do not, however, think the policy at 45.102 is strong enough to prevent acquisition of general purpose property. I am aware of a $20 M increase in OPE for 2005 at one large contractor. This is in addition to the millions of OPE that has already been purchased in the past few years. The past DoD letters stating that "Facilities/OPE" assets should not be provided will now be ineffective since there will no longer be "Facilities/OPE". Unless there is something stronger than the words in FAR 45.102, there will be an increase in this type property on a regular basis. Contractors are very good at convincing buying offices that they cannot do their job without Government property, and the buying offices want their product, so they believe it is in the best interest of the Government to do so. This is part of what is currently raising contract costs.

FAR 45.107 (a)(1) does not address the issue of Fixed Price contracts with cost CLINS. I am aware of GP being acquired under that scenario and I believe that should be included as one of the examples. A large number of FP contracts do contain cost CLINS.

FAR 45.107 (d) where is "simplified acquisition threshold" defined?

FAR 45.501 (b) Fixed price type contracts – this section needs to address title to property under cost CLINS. As stated above, this is happening.

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FAR 52.245-1 (b) (3) Should IWTAs be addressed somewhere? More and more of those type documents are being used and many times the "sister" companies do not use the same procedures, disclosure statements, property control systems, etc. Are all of these branches from a corporation really to be considered alternate locations? Are they all really working to the prime contract? If so, what are the ramifications if one of the corporation's alternate locations becomes inadequate?

FAR 52.245-1 (b)(3) Since the limited risk-of-loss is written into the clause, does this requirement to flow down to subcontractors the limited-risk-of loss apply to all their subcontractors, or do they have an option to withhold that provision if they do not feel the subcontractor meets the requirements for an adequate property control system? That is not clear.

FAR 52.245-1 (b) – I would like to see it changed to say Property management. (1) The Contractor shall have a system to manage (control, use, preserve, protect, repair, and maintain) all Government property, including the multi-part assets, in its possession. One example - Special Tooling can be multiple-part and unless all parts are controlled, the asset can not be adequately protected or maintained.

FAR 52.245-1 (c) Yes! Yes! Yes! Contractors have not felt this was necessary in the past because it was not clearly stated that they must request permission to modify or cannibalize all classifications of Government property. This is a big improvement – nice and clear.

FAR 52.245-1 (f) (1) (i) Acquisition of property. I would like to see added at the end - …and/or cost accounting disclosure statement of the prime contractor. I have knowledge of incidents where the disclosure statements of the subcontractors (especially those over seas) & IWTAs allow the purchase of general purpose equipment (currently called OPE) although the disclosure statement of the prime contractor does not. Thus, those charges are being passed forward to the Government as allowable because the IWTA or subcontractor has a disclosure statement that allows it. I believe the disclosure statement of the prime contractor should take precedence because that is the entity that the Government has contracted with. I would like that to be made very clear here. This is raising contract costs and my tax dollars.

FAR 52.245-1(f) (1) (iii) (A) Records of Government property - I see accountable contract number listed as one of the required fields. I believe this is a necessity, but I believe the acquisition contract number should also be required. That must be a part of the audit trail to validate the correct ownership. For example, ST acquired under a cost contract as GP – transferred to a FP contract – might appear to be incorrectly coded GP unless the acquisition contract is part of the accountable record.

FAR 52.245-1 (k)(2) Abandonment of GP – should read – The, Government, upon notice to the Contractor, may abandon any non-sensitive Government property in place on the Contractor's facility, at which time… There are still GOCO plants that abandonment should not apply to – that would mean the GP was being abandoned to the Government, which should not be an option.

2004-025-13

Concerning removal of the clause 52.145-18 – STE clause - I have mixed feelings about this clause being abolished. While it is certainly out dated, I am aware of general purpose test equipment being submitted as "special" test equipment for the purpose of having the Government pay for it. Unless some other controls are put into place within the contractor's property management system, I believe this may contribute to additional acquisition of GP and rising contract costs.

Concerning removal of the clause 52.245-17 – ST clause - I am 100% in favor of this. I believe the clause has been misunderstood and is confusing and cumbersome to administer. I am aware of Contracting Officers interpreting the words in the current clause "at the end of the contract" to mean "at the end of the program", so title is not offered or taken until the program ends - at Contracting Officer direction. The Right-to-Title Tooling (RTT) is transferred from contract to follow on contracts as RTT through out the life of the program. While the Government pays for the RTT and has a vested interest in it, it is not considered Government property under the Government property clause. I believe the fact the contractor is liable under the Progress Payment Clause and the Performance Base Payment Clause rather than having limited liability under the GP clause, is not understood. I do not believe that is adequately addressed in the Government contracting classes. I do not believe the losses or damages to RTT are always reported as they should be. I am aware of Contracting Officers granting relief of liability under the GP clause even though it does not apply to RTT property. Because RTT is not part of the Government Property Control System Analysis, no one is monitoring it. In my opinion, the Contracting Officers should decide up front whether or not they want to own the tooling under a contract. If they do want it to be GP they should make it a line item in the contract. It would also make it easier for the contractors to distinguish between Government-owned Special Tooling and RTT on their records or with separate identification tags. One process for all tooling under a program would make the contract easier to administer for both the Government and the contractors, less confusing, and would be a cost savings in the long run. Also RTT does not appear to be addressed in the information I have read so far on the leading industry standards.

Dianne Blankenstein

2004-025-14

no-reply@erulemaking.net
11/15/2005 10:25 AM

To farcase.2004-025@gsa.gov
cc
bcc
Subject Public Submission

Please Do Not Reply This Email.

Public Comments on Federal Acquisition Regulation; Government Property:========

Title: Federal Acquisition Regulation; Government Property
FR Document Number: 05-18516
Legacy Document ID:
RIN:
Publish Date: 09/19/2005 00:00:00
Submitter Info:

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Postal Code: 92152
Organization Name: Defense Acquisition University (West Region)

Comment Info: ==========

General Comment:1.) In the introductory text to this case, the following statement is made, "In the case of GOCOs, it is believed that agencies' property management needs can better, and more appropriately, be met through tailoring the statement of work in these service contracts to the agency's specific needs and incorporating the new property clause at FAR 52.245-1." The "tailoring the statement of work" referred to in this statement is unclear. What exactly is the council expecting contracting personnel to insert into statements of work? There is no indication given. Further, from a contractual standpoint one of the most problematic areas of "Government Property" is proper application of policies and clauses to large service contracts where contractor personnel will be utilizing government spaces, to include desks, phones, computers, access to government libraries, etc. These things aren't really "Government Property" in the sense that these items will be "delivered" to the contractor or in the sense that the Government would like the contractor to maintain records of these items (per new proposed clause 52.245-1 (f)(1)(iii)); nor can the government usually adequately define these items. Nevertheless, statements of work for services typically include such broad language under some sort of heading usually titled "Government Furnished Property"; when such property clearly is not categorized or listed appropriately. Is it possible for this rewrite to take such "provision" of "government property" into account from a policy perspective? (e.g. provide sample language for use of government facilities in service contracts when government personnel will be maintaining records/inventories of the "provided" property.)

2.) Under "Supplementary Information: A. Background" the rule states "The proposed rule requires contracting officers . . . to be aware of

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industry-leading practices and standards for managing Government property." How is this awareness to be obtained? Will the Council direct the creation of new DAU courses specifically for this purpose?

3.) The proposed section 45.102 (b) reads, ?Contracting officers shall provide property to contractors only when it is clearly demonstrated-?? It is unclear from this text what constitutes ?clearly demonstrated.? Is the council looking for written documentation or a Determination & Findings in accordance with FAR 1.7? In today?s overburdened contracting environment, unless a specific mandate for written documentation is included, contracting personnel are bound to interpret ?clearly demonstrated? as broadly and loosely as possible. (e.g. ?the facts speak for themselves and constitute adequate ?clear demonstration?, no further demonstration (written documentation) is necessary?) Under the previous version of the FAR (specifically FAR 45.302-1(a)(4)) after obtaining a written certification from the contractor of inability to provide the facilities a D&F was required to be processed prior to providing facilities. Under the proposed rewrite the burden on the Contracting officer appears to be significantly less; even though the background to this rewrite states that an associated impact of this rewrite is a ?stricter policy for contracting officers to follow when determining whether or not to provide property to contractors.? The council should clarify their intent.

4.) Also regarding 45.102(b)(2), how is the contracting officer supposed to calculate / identify the "cost of administration, including ultimate property disposal"?

5.) Regarding 45.102(b)(3), the reference to "risk" is unclear. Risk of what? Successful contract performance?

6.) Regarding 45.401(a), how will the contracting officer know the "authorized" law or regulation governing the disposition of property? Why not explain in the rule, or at least refer the reader to the cognizant law and/or regulation?

7.) Regarding 52.245-1, there is no requirement for the contractor to obtain approval from the contracting officer prior to acquiring CAP. Per 45.201(a), all GFP must be identified in a solicitation. Why shouldn't CAP be identified in a contract in a similar fashion? If CAP cannot be identified at the time of award, there should be a requirement for the contractor to seek authorization before acquisition. Alternate II to 52.245-1 does require authorization from the contracting officer prior to acquisition for items with a cost of less than $5000; however Alternate II only applies in limited situations.

8.) The last sentence of 52.245-2(a) states, ?The Contractor shall be afforded the opportunity to inspect the Government property as specified in the solicitation.? However, the prescription for this clause (45.107(b)) does not instruct the contracting officer to make any such specification in the solicitation. Is it the intent for this clause to be utilized in conjunction with the 52.237-1 ?Site Visit? clause in every instance, or for the contracting officer to provide other instructions in the solicitation?

2005-025-15

"Bob Spreng - IDCC"
<bob.spreng@idcc.org>
11/16/2005 01:22 PM

To farcase.2004-025@gsa.gov
cc "Alan Ayers" <AlanD.Ayers@energizer.com>, "Bill Siederman" <seidermawm@corning.com>, "Bob Aasen" <bob.aasen@honeywell.com>, "Bob Spreng"
bcc
Subject letter to GSA on Property Regs

INTEGRATED
DUAL-USE
COMMERCIAL
COMPANIES

November 6, 2005

General Services Administration
Regulatory Secretariat (VIR)
1800 F Street, N.W., Suite 4035
Washington, D.C. 20405

ATTN: Laurieann Duarte

Ref: FAR Case 2004-025: Proposed Rule: Government Property

By email: farcase.2004-025@gsa.gov

Dear Ms. Duarte:

The members of IDCC (Integrated Dual-use Commercial Companies) are pleased to have the opportunity to submit comments on the referenced proposed rule.

IDCC was formed in 1991 as a consortium of U.S. based major global commercial firms that are technology leaders in their industries. The members sell commercial items to the Government and perform a limited amount of government sponsored R&D. They frequently function as subcontractors or suppliers to Federal Prime Contractors.

IDCC is dedicated to improving the efficiency and effectiveness of federal government procurement and R&D interactions with commercial business units. A primary goal is to encourage and monitor the implementation of Federal Acquisition Reform legislation, regulations and practices in an effort to eliminate counterproductive requirements. Many times these requirements overlap or conflict with proven commercial practices and, consequently, greatly restrict the commercial business unit's ability/willingness to allow the government access

025-15

to their most advanced commercial/dual-use technologies. Member firms include Corning, Inc., Dow Chemical Company, Eaton Corp., Eastman Chemical Company, Energizer Battery Manufacturing, Inc., Honeywell International, Inc., and W. L. Gore & Associates.

COMMENTS

At a recent meeting we were fortunate to have received an excellent briefing on the proposed changes by Tom Ruckdaschel, Property and Equipment Policy, OSD. It was our unanimous opinion that overall the proposed changes were beneficial and that IDCC should support the proposed regulation as is.

It was refreshing to see such a practical approach to regulation writing. It appeared to us that when the proposed regulation is implemented the new approach will be far more compatible with existing commercial methods.

Sincerely,

Robert C. Spreng, President
IDCC -- Integrated Dual Use Commercial Companies
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Marietta, GA 30067
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2005-024-16

Jean.Carter@do.treas.gov
11/16/2005 03:13 PM

To farcase.2004-025@gsa.gov
cc thomas.l.riddle@irs.gov, Bonnie.A.Hanger@irs.gov
bcc
Subject FAR Case 2004-025, Government Property

The attached comments on proposed changes to the FAR on government property are provided for your consideration. The Internal Revenue Service Bureau of the Department of the Treasury has provided these comments. The IRS point of contact for the comments is Thomas Riddle, telephone (202) 283-1134.

Jean Carter
Department of the Treasury
Office of the Procurement Executive
(202) 622-6760

<<Treasury Comments on FAR Case 2004-025.doc>> Treasury Comments on FAR Case 2004-025.doc

C 24-16

IRS Comments on Proposed Rule: FAR Government Property [FAR Case 2004-025]

FR Page No. / Proposed FAR Paragraph Reference
FR 54882 / FAR 45.101
Proposed Rule Text (Perspective)
Definitions. "*Acquisition cost* means— . . . (2) For Government furnished property, the amount identified in the contract, or in the absence of such identification, the fair market value attributed to the item by the contractor."
Comments or Suggested Alternate Text for Consideration
Generally speaking, fair market value (FMV) is the price that property would sell for on the open market. It is the price that would be **agreed on** between a willing buyer and a willing seller, with neither being required to act, and both having reasonable knowledge of the relevant facts. [Emphasis added.] While agreement on FMV may be implict in the proposed definition, it is recommended that it be explictedly stated, and the text changed to read along the lines of the following: ". . . the fair market value attributed to the item and agreed upon by the parties."

FR Page No. / Proposed FAR Paragraph Reference
FR 54882 / FAR 45.101
Proposed Rule Text (Perspective)
Definitions. "*Demilitarization* means rendering a product designated for demilitarization unusable for . . ."
Comments or Suggested Alternate Text for Consideration
While the term and definition are unchanged from that currently used in the FAR, it comes off as something of an overkill, and is arguably ill-suited for its intended purpose. In common usage, the term demilitarization means "to eliminate the military character of," or "to replace military control of with civilian control." Recommendation is to tone it down a bit and move away from the military slant it conveys. Other terms for consideration (both as the term being defined and for use in the definition) include— "disenable," "neutralize," "immobilize," "incapacitate," or "decommission" (still somewhat militaristic, but more commonly used by both military and non-military components). The recommendation also applies to the demilitarization definition in proposed FAR 52.245-1.

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FR Page No. / Proposed FAR Paragraph Reference
FR 54883 / FAR 45.104
Proposed Rule Text (Perspective)
See Comments.
Comments or Suggested Alternate Text for Consideration
Recommendation is to add or reinstate language that is substantially similar to that currently used at FAR 45.103(c). "(c) When justified by the circumstances, the contract may require the contractor to assume greater liability for loss of or damage to Government property than that contemplated by the Government property clause~~. s or the clause at 52.245-8, Liability for the Facilities.~~ For example, this may be the case when the contractor is using Government property primarily for commercial work rather than Government work." [Note: Stikethrough is made in recognition of proposed removal of 52.245-3 through 52.245-8.] The addition/reinstatement of the suggested text is consistent with the text in 52.245-1(h), as proposed .

FR Page No. / Proposed FAR Paragraph Reference
FR 54883 / FAR 45.105(b)
Proposed Rule Text (Perspective)
"(b) The property administrator shall notify the contractor . . . and shall request prompt correction of deficiencies and shall provide a schedule for their completion. If the contractor does not correct the deficiencies in accordance with the schedule, the contracting officer shall notify the contractor . . . that failure . . . may result in— (3) Other such action as determined by the contracting officer."
Comments or Suggested Alternate Text for Consideration
• Recommend that the text be revised so that the contracting officer and not the property administrator is the official requesting/directing correction of deficiencies and the schedule for such. This is more in keeping with the responsibilities of the contracting officer. To make this a responsibility of the property administrator would further blur the lines between actual authority and apparent/implied authority. If the responsibility were delegated, odds are that it would be to the contracting officer's [technical] representative (COR or COTR). • Recommend changing subparagraph (3) to read along the lines of— "Exercises any other rights or remedies available to the Government under the contract." Suggested alternative language is viewed as a more appropriate term of art, and one that is directed at tightening up the proposed text which seems overly broad.

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FR Page No. / Proposed FAR Paragraph Reference
FR 54883 / FAR 45.106
Proposed Rule Text (Perspective)
Transferring accountability. See Comment.
Comments or Suggested Alternate Text for Consideration
Consideration might be given to adding guidance as to which contractor (gaining or losing) would typically absorb (or bill for) the cost of the property transfer.

FR Page No. / Proposed FAR Paragraph Reference
FR 54883 / FAR 45.107(a)(3)
Proposed Rule Text (Perspective)
"(3) The contracting officer shall use the clause with its Alternate I when a contract . . . whose primary purpose is the conduct of scientific research. (see 35.014) is contemplated."
Comments or Suggested Alternate Text for Consideration
Proposed rule at FR 54882, FAR Part 35 – Research and Development Contracting, reads "35.014 [Removed and Reserved] 8. Remove and reserve section 35.014." FAR 45.107(a)(3), as proposed, needs to be revised to eliminate the reference to FAR 35.014 as it is slated for removal.

FR Page No. / Proposed FAR Paragraph Reference
General Observation
Proposed Rule Text (Perspective)
See Comments.
Comments or Suggested Alternate Text for Consideration
According to the background information at FR 54879, "A new property clause at 52.245-2 . . . was added specifically to address contracts designed for military base-operating and installation-level contracts, particularly those awarded under the . . . A-76 process." With the emphasis directed at awards under the A-76 process, consideration might be given to providing property accountability guidance relative to the different types of service providers (as opposed to merely contractors) that may be selected under A-76. While the Most Efficient Organization (the staffing plan of the agency tender) and Public Reimbursable Sources (another federal agency that could perform a commercial activity for another agency on a fee-for-service or reimbursable basis) are Government entities that are not typically subject to FAR Part 45 themselves, they may be comprised of, or they may subcontract to or partner with business concerns that are subject to FAR Part 45, and additional guidance for effectively managing GFP might be warranted and helpful.

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FR Page No. / Proposed FAR Paragraph Reference
General
Proposed Rule Text (Perspective)
See Comments
Comments or Suggested Alternate Text for Consideration
Dollar limits for inventory systems required by contractors should have a lower-level dollar value declared (i.e. the simple acquisition threshold). Requiring detailed inventory on minor value items will increase costs without notable improvements in inventory control.

FR Page No. / Proposed FAR Paragraph Reference
General
Proposed Rule Text (Perspective)
See Comments
Comments or Suggested Alternate Text for Consideration
The paper work burden on contractors to maintain separate inventory systems may be overbearing. Where existing government inventory systems are in place with the inventory already loaded, the government should consider allowing limited contractor use/access to allow the government system to be used in lieu of a separate stand-alone inventory system.

FR Page No. / Proposed FAR Paragraph Reference
General
Proposed Rule Text (Perspective)
See Comments
Comments or Suggested Alternate Text for Consideration
In areas where the FAR requires a response (such as 45.105) a suggested time frame for vendor responses should be stated (i.e. within 10 business days).

FR Page No. / Proposed FAR Paragraph Reference
54822/45.101/*Government Inventory* (3)
Proposed Rule Text (Perspective)
See Comments
Comments or Suggested Alternate Text for Consideration
It may be difficult or impossible to estimate GFP utilization over a 5- or 10-year contract period. Recommend that allowances be made for revisiting the turn-in of excess property where exceptional circumstances exist.

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FR Page No. / Proposed FAR Paragraph Reference
54823/45.105(a)
Proposed Rule Text (Perspective)
See Comments
Comments or Suggested Alternate Text for Consideration
Recommend that, after initial contract award, that verification of the existence of inventory systems be done by exception. Requiring routine verifications places an unnecessary additional burden on the CO without a just cause to suspect the initial system is faulty or not in use. Property rules used in IRS are reflected in the attached extract from the ADC PWS.

FR Page No. / Proposed FAR Paragraph Reference
54886/52.245-1(d)(3)(ii)
Proposed Rule Text (Perspective)
See Comments
Comments or Suggested Alternate Text for Consideration
Specify what constitutes a timely request.

FR Page No. / Proposed FAR Paragraph Reference
54887/52.245-1(f)(4)(vi)(A)
Proposed Rule Text (Perspective)
See Comments
Comments or Suggested Alternate Text for Consideration
Specify what constitutes prompt reporting.

FR Page No. / Proposed FAR Paragraph Reference
54887/52.245-1(f)(4)(xiii)
Proposed Rule Text (Perspective)
See Comments
Comments or Suggested Alternate Text for Consideration
Specify what constitutes a prompt disclosure.

2004-025-17

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FAR Case 2004-25
Federal Acquisition Regulation; Government Property

45.104 - Responsibility and liability for Government property

Change From: (b) . . .A prime contractor that provides Government property to a subcontractor shall not be relieved of any responsibility to the Government that the prime contractor may have under the terms of the prime contract.

Change To: (b) . . .A prime contractor that provides Government property to a subcontractor shall not be relieved of any responsibility to the Government that the prime contractor may have under the terms of the prime contract. The prime contractor may extend the Government's assumption of risk into subcontracts in accordance with the terms of the prime contract. The prime contractor shall enforce for the benefit of the Government any liability that the subcontractor may have for loss, damage, destruction, or theft of Government property.

45.107 – Contract Clauses

Change From: (d) When the acquisition cost of the item to be repaired does not exceed the simplified acquisition threshold, purchase orders for property repair do not need to include a Government property clause.

Change To: (d) Unless Government property is being provided for purchase order use, purchase orders for property repairs that do not exceed the simplified acquisition threshold do not need to include a Government property clause.

45.501 – Support Government Property Administration

Change From: (b) In instances where the prime contractor does not agree to allow the support property administrator to provide support property administration, the prime property administrator shall immediately refer the matter to the contracting officer.

Change To: (b) In instances where the prime contractor does not agree to allow the support property administrator to provide support property administration, the prime property administrator shall immediately refer the matter to the contracting officer. Pending agreement from the prime contractor to allow support property administration, the prime contractor shall be responsible for performing analysis of the subcontractor's property management system. The prime contractor shall take action to assure that any sited deficiencies are corrected in accordance with schedule and that all Government property is safeguarded from risk. The prime contractor shall notify the subcontractor

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that failure to correct sited deficiencies in accordance with schedule will result in withdrawal of any assumption of risk provision incorporated under the terms of the prime contract.

52.245-1 (f)(ii)(A) – Government Property Clause – Contractor plans and systems – Receipt – Government-furnished property

Change From: (A) The Contractor shall furnish a written statement to the Property Administrator containing all relevant facts, such as cause or condition and a recommended course(s) of action, if overages, shortages, or damages and/or other discrepancies are discovered upon receipt of Government-furnished property.

Change To: (A) The Contractor shall report all discrepancies pertaining to the shipment, packaging, or transportation of Government-furnished property in accordance with agency procedures. However, for information purposes, the Contractor shall furnish a written statement to the Property Administrator containing all relevant facts, such as cause or condition and a recommended course(s) of action, if overages, shortages, or damages and/or other discrepancies are discovered upon receipt of Government-furnished property. Upon request from the Contractor, the Property Administrator may assist and coordinate resolution of unresolved discrepancies.

52.245-1 (f)(iii)(A) – Government Property Clause – Records of Government property

Clarification: Please clarify what is meant by, "bulk identifier".

52.245-1 (f)(iv) – Government Property Clause – Physical Inventory

Change From: The Contractor shall periodically perform, record and report physical inventories during contract performance . . . .

Change To: The Contractor shall periodically perform, record and report physical inventories during contract performance. The type, frequency and reporting format will be agreed upon between the Contractor and Property Administrator. . . .

52.245-1 (f)(vi) – Government Property Clause – Reports

Change From: . . . Such reports shall, at a minimum, contain the following information:

Change To: . . . . Such reports shall be required for property in the prime contractor's possession and control; and property located at subcontractor's for which the assumption of risk provision has been incorporated under the terms of the prime contract. The reports shall, at a minimum, contain the following information:

52.245-1 (f)(vi) – Government Property Clause – Reports

Addition: (A) (12) Last known location

(A) (13) In cases involving loss or theft: a statement that the property did or did not contain sensitive or hazardous material; and that if the lost or stolen property was sensitive or hazardous, the appropriate Government agencies were notified.

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52.245-1 (h) – Government Property Clause – Contractor Liability for Government Property

Addition: The prime contractor shall enforce for the benefit of the Government any liability that the subcontractor may have for loss, damage, destruction, or theft of Government property.

Comments on the deletion of the clause at 52.245-17, Special Tooling

During my 13 years as the Property Administrator at DCMA/Northrop Grumman there were numerous instances in which Special Tooling (ST), acquired on fixed price contracts or subcontracts was required for use on follow-on contracts or subcontracts. The tooling was required for new or spares/repair part production; up-grade contracts; or for re-fabrication of worn or lost tooling.

Efficient recall of Special Tooling that had previously been sent to storage became so crucial to successful contract performance that a joint Government/Contractor Lean Event was held in 2004 to streamline the Special Tooling recall process. Maximum reutilization of Special Tooling resulted in better support to the war fighter (shorter lead-time, quicker product delivery) and a cost savings to the Government (eliminating the need to procure new tools).

An additional point to consider is "program life". As programs mature and existing Government owned Special Tooling wears out; replacement tools are needed to sustain contract performance. These tools are essential for production, proofing other tools, and product inspection. If the Government does not take title to these tools, they will be relinquishing both the tools and the tool drawings (electronic or physical). This could create a competitive advantage for the contractor with follow-on contracts.

I recommend that either:

1) FAR 52.245-1 - Include a provision directing the contractor to submit a final list of acquired Special Tooling to the Contracting Officer for review, 60 days prior to contract completion, identifying those tools that have not become obsolete. The Contracting Officer will issue a modification, adding a Contract Line Item for those items of Special Tooling, and corresponding tool drawings (electronic or physical), required by the Government as deliverable end items.

2) FAR 52.245-1 - Include a provision giving the Government unlimited rights to the tool drawings (electronic or physical) produced in performance of the contract.

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NATIONAL ASSOCIATION OF STATE AGENCIES FOR SURPLUS PROPERTY

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November 16, 2005

Ms. Laurieann Duarte
The United States General Services Administration
Regulatory Secretariat (VIR)
Room 4025
1800 F Street, NW
Washington, DC 20405

Dear Ms. Duarte:

On behalf of the National Association of State Agencies for Surplus Property (NASASP) and the more than 60,000 fire department, police departments, hospitals, town and state governments, schools, economic development agencies, highway departments, and other community services that we serve through the Federal Surplus Property Donation Program, I would like offer our comments on the proposed amendment to the FAR on Government Property in the Possession of Contractors. I refer to FAR Case #2004-025, Federal Acquisition Regulation; Government Property.

NASASP members, representing 56 states, United States territories and the District of Columbia, manage the State Agencies for Surplus Property (SASPs) that distribute surplus Federal personal property. The SASPs have done so since the inception of the donation program over 55 years ago with the passage of the Federal Property and Administrative Services Act of 1949.

NASASP believes that the FAR, as it relates to property in the possession of contractors, has a deleterious effect on the donation program. The proposed amendment continues rather than corrects this situation. The amendment does nothing to prevent the abuse of the authority to dispose of property as scrap, nor does it recognize the appropriate priorities for the disposal of surplus personal property.

- **The proposed amendment does not provide a clear definition of "scrap".** Over the past decade we have seen a steep increase in the amount of serviceable surplus property that could be put to good use by our donees, disposed of as scrap. We routinely screen and pull donable

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property out of scrap yards all across the United States and overseas. The fact that contractors will continue to have authority to identify excess assets as scrap without Government approval invites waste and abuse, and ignores the intent of the donation provisions of the Property Act.

- **The proposed amendment does not address the disparity in the disposition of excess/surplus property in the possession of a Federal Agency and the same type of property in the possession of a contractor.** The FAR provides that contractors buy the property as the first priority for disposition of excess property. This priority is continued in the amendment and thus runs counter to the priorities established in title 40 (The Property Act) that provides first for reutilization, followed by donation. Sale, and in this case the purchase of the property by the contractors, would come last. Why is Government excess/surplus in the possession of contractors treated differently than other Government property?

If these provisions of the amendment are enacted, the resulting lack of redistribution efforts will adversely affect the Federal Donation Program.

I urge you to consider our concerns as outlined, and to bear in mind the welfare of the Donation Program as you act on this amendment. We welcome the opportunity to present testimony regarding the ramifications of this amendment during your deliberations.

Sincerely,

Dick Graves

Dick Graves, President
NASASP

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SOCIETY OF LAW, CONTRACTS, AND PROCUREMENT

November 17, 2005

Ms. Laurieann Duarte
FAR Secretariat
General Services Administration
Regulatory Secretariat (VIR)
1800 F Street N.W.
Room 4035
Washington, D.C. 20405

Re: FAR Case 2004-025

Dear Ms. Duarte:

We, the undersigned members of an undergraduate class for Contract Management, instructed by Dr. John B. Wyatt III, at California State Polytechnic University, Pomona, are submitting these comments pertaining to FAR Case 2004-025. These comments focus on the proposed changes to the FAR that affect the government's policies on government property. Our key concern is how these changes will potentially adversely affect small business and small disadvantaged business contractors.

In short summary (1) we find that the proposed regulatory changes confuse rather than simplify the government property provisions and would require an unrealistic learning curve to be imposed; (2) we disagree with the government having an unlimited option to designate government property "As Is"; (3) we believe that the new standard of "industry leading practices" particularly works to the disadvantage of small businesses and small disadvantaged businesses, and (4) we find that the usage of the word "stewardship" is ambiguous and needs definitive clarification.

Also, we have noted and suggest that the equitable adjustment provision of the proposed mega clause (52.245-1(i) (2)) needs a "house-keeping" clarification concerning when property is provided "As Is." In summary, we conclude that the revision in its current form should be withdrawn and consideration given to the points that we will address below.

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1. The Proposed Mega Property "As Is" "At the Government's Option" Provision Could Potentially Discriminate Against Small and Disadvantaged Businesses

The new FAR Case 2004-025 does not fulfill its objective of clarifying language and simplifying procedures, because they are combining and/or deleting imperative clauses such as 52.245-2, 52.245-5, and 52.245-19. As the drafters of the FAR Case 2004-025 have attempted to rationalize:

"... The FAR Clauses at 52.245-1, Property Records; 52.245-2, Government Property (Fixed Price Contracts); 52.245-5, Government property (Cost-Reimbursement, Time and Materials, or Labor Hours Contracts); and 52.245-19, Government Property Furnished "As Is", was combined to form one new clause: 52.245-1."
"...The following clauses were deleted in their entirety because they are either obsolete or conflicted with the use of consensus standards and/ or industry leading standards and practice for property management:

- 52.245-5
- 52.245-19..."

(We hereafter address the new proposed 52.245-1 clause as the Mega Property clause[1].)

A. No Pre-Contract Inspection Rights Under Cost Contracts

First, we agree with the comments of Richard C. Johnson Esq. that this new Mega Property clause would allow the government to implement the "As Is" provisions, without limitation with the result that the contractor will have no contractual right to a pre-contract inspection in cost type contracts.[2] We agree with learned counsel that it defies logic why contractors would not have the pre-contract ability to inspect in cost contracts to determine if the property will be able to aid in contract performance.

B. Government's Ability to Designate At its Whim When Government Furnished Property Will Be 'As Is"

We believe that this particularly works to the disadvantage of small businesses in that arguably they are more dependent financially upon receiving "suitable for use" government furnished property. But, when such property is furnished "As Is", they have no guarantee that they can even use the property. We say this because the new language allows the government to insert the "As

[1] John B. Wyatt III, "The 'Three Musketeers' of Overhead Property: *Motorola*, *Hughes* and *Raytheon* Cases," Journal of Contract Management, p23 (Summer 2005).
[2] See Comments of Richard C. Johnson, Smith Pachter McWhorter & Allen, "Regarding Proposed Changes to Government Property Provision FAR Case 2004-025" September 20, 2005 at p. 4..

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Is" clause at its whim. If this is an attempt to simplify, in our opinion, it miserably fails. It leaves the contractor in the dark with no standards outlining when the contractor can reasonably expect when the property will be provided "As Is" or if the warranty of suitability for intended use can be relied upon.

This unfettered "As Is" option power gives the government an unfair amount of control over the contractor and may even limit the contractor's ability to perform the job as contractually required and avoid a potential termination for default. This may cause undue, untimely, and expensive litigation down the line. Small businesses and minority contractors would be the most affected, due to lack of resources (in comparison to larger businesses) to obtain other property and/or construct their own so as to fulfill their contractual obligations.

C. New FAR Case Complicates and Misleads Rather Than Simplifies and Imposes a Unnecessary Learning Curve

As students studying contract management and procurement policies, it baffles us as to why the government would delete and combine these clauses that have been relied upon for many years by all contractors, and especially small and disadvantaged businesses. We do not understand how the government with a straight face can say that it is simplifying matters? This new Mega clause (52.245-1) is going to require a significant learning curve. Further, as several members of our class have honorably served in the United States Armed Forces in current theaters of conflict, we question why this change is being implemented at this time. Our government and its contractors' contract management professionals must provide the very best of military material and other resources needed to successfully aid our military in their respective missions. We feel that the new "learning curve" that this FAR case would impose as well as the potential arbitrary governmental option of declaring property "As Is" would detrimentally impact the military supply chain at a time which is most imprudent.

2. Justifiable Reliance on "As Is" Clause and Primary Property Clause as Separate Provisions

The proposed FAR case revision would read:

52.245-1 (d) (iii) The Government may, at its option, furnish property in an "As Is" condition. In such case, the Government makes no warranty with respect to the serviceability and/or suitability of the property for contract performance. Any repairs, replacement, and/or refurbishment shall be at the contractor's expense. (See new proposed FAR Case 2004-025)

Contractors currently are familiar with the relevant government property clauses (e.g. 52.245-2 and 52.245-5), and the "As Is" (52.245-19) as separate clauses. As stated beforehand, under the proposed Mega Clause 52.245-1, all

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clauses are condensed into one, which is contra to the historical reliance of the clauses being separate.

The effect of this reliance is best illustrated by the Armed Services Board of Contract Appeals in its *Dayron Corporation*[3] decision. The board noted that the "As Is" clause by its specific language required the insertion of the standard "Government Property" clause as a prior condition to the insertion of the "As Is" clause, although that clause had been left out of the contract.[4] The board also determined that the supplying of the property as "As Is " per that clause was inequitable and instead used the G.L. Christian Doctrine to incorporate by operation of law the applicable government property clause that warranted the property as suitable for intended use.[5] In a nutshell, the Board determined that the government "totally messed up" in the drafting of that contract by declaring that the government property was "As Is" (when it should not have been) and again messed up by not including the primary government property clause which should have been in the contract.

This case illustrates three key points: (1) contractors have historically relied on a principal government property clause being present in their contract that outlines their duties as well as the government's responsibilities regarding said property; (2) contractors have historically relied on the "As Is" clause as being stated in their contract as a completely separate clause; and (3) by combining these clauses, contractors may, by justifiably relying on the historical language and case law precedent, in fact erroneously conclude that the property is being supplied with all warranties intact when in reality it is being supplied "As Is".

3. This Proposed FAR Case 2004-025 Imposes a Hardship on Small Business by Now Requiring "Industry-Leading Standards and Practices" Versus the Previous Standard of "Sound Industrial Practices"

The proposed change to the FAR requires "contracting officers, property administrators and other personnel involved in awarding or administering contracts with Government property to be aware of industry-leading practices and standards for managing Government property." (See background section A, paragraph 6)

What does the term "aware of" mean? The language should be more concrete and expressive, perhaps saying, "Contracting Officers

[3] ASBCA NO.24, 919, 84-1 BCA 17, 213 (1984)
[4] John B. Wyatt III, "Is the Government Property Clause Second Rate?" *The Property Professional*, December 1993.
[5] John B. Wyatt III, "The Christian Doctrine: Born Again But Sinfully Confusing" *Contract Management* November 1993.

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[should]...*act according to and/or require the contractor to implement* industry-leading practices."

We question what is meant by the statement "industry-leading practices and standards." What some companies view as industry-leading practices and standards may vary from the perspective of other companies. There needs to be a definition of what practices need to be followed so that contractors can meet their contractual obligations as well as to avoid any potential ambiguities. Defining and establishing a clear cut standard will keep the practices consistent between different contractors and provide a framework by which all contractors can follow.

Notwithstanding our comments above, we note that one noted expert believes the new language of "industry leading practices" may provide a more meaningful description of property management[6] than the previous language of "sound-industrial practice." However, not all government contractors, especially small and disadvantaged businesses are experts in the field. We particularly caution that the government must consider its potential impact on small businesses. We question how this new language will adversely affect small businesses in that they which may not be able to afford the switch to potentially expensive, time consuming and unnecessary "industry-leading practices", when the prior standard of "sound industrial practices" had previously been quite sufficient. If the small business contractor already adequately meets the current FAR standards of "sound industrial practices" and can perform their contractual obligations accordingly, why fix something that already works? Further, the change of language may constitute a significant "chilling effect" in that many small and disadvantaged businesses may elect to not even contract with the government. If any contractors may benefit from this new language, it most likely will be large companies who may already have these standards in place or can more easily afford to implement them.

4. Government Needs To Specify What Is Meant By "Stewardship"

One of the key stated objectives of new FAR Case 2004-025 was to clarify the language of regulations regarding the use of Government property. We feel that this revision has failed to do so when the term "stewardship" is used under 52.245-1 part 11 subpart (vii):

Relief of stewardship responsibility. Unless the contractor shall be relived of stewardship responsibility for Government property when such property is...

[6] Anderson, Andrew. "Update of Draft Property Rule Revised FAR Parts 45 and 52 Far Case 2004-025." Sunflower Fusion. 19 May 2005.

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We have found multiple and conflicting definitions of the term stewardship which could possibly lead to different interpretations of the clause in which it is used. It is unclear as to which of the definitions of stewardship the government intended to be used in this situation. This lack of a definition makes the contractor's responsibility undefined and creates confusion as to which definition should be applied.

Multiple Definitions We Have Found:

- Financial management of purchases, finances funds, etc; term or period of such management[7]
- The way in which someone controls and takes care of an organization or event[8]
- The responsibility of an individual or group charged with the financial management of an organization, including of assets, profits and losses, obligations and other basic matters[9].

As the above definitions illustrate, there is discrepancy among language scholars as to the meaning of 'stewardship". Although the government knows what its intent is in using the word "stewardship", a contractor cannot read the mind of the government. Even, when consulting a dictionary or by looking up the meaning of stewardship on the internet, the contractor will still be unenlightened as there are different and conflicting definitions which will only create unnecessary confusion. The cure is for the drafters to state the precise definition of stewardship it intends to apply in the definitions section to avoid any questions or confusion down the line. We feel that FAR Case 2004-025 should be withdrawn so the government's intended definition can be placed in the opening list of definitions in 52.245-1 of the proposed FAR Case.

5. "House-keeping" Change to Equitable Adjustment Clause

Under the proposed FAR change, we interpret it as giving the government discretion to insert the "As Is" clause regarding Government furnished property at its whim (see above). Under the Equitable Adjustment provision in subpart (i), a contractor has the right to an equitable adjustment if the property is in a condition not suitable for its intended use, but the new language makes no reference to the "As Is" clause as an exception. Logic dictates that an equitable adjustment is not available to the contractor when the property is provided "As

[7] "Stewardship." Concise Dictionary of Business Terminology. New Jersey: Prentice Hall, 1981. 174.
[8] "Stewardship." Longman Business English Dictionary. England: Pearson Education Limited, 200.
[9] Cross, Wilbur "Stewardship." Prentice Hall Encyclopedic Dictionary of Business Terms. New Jersey: Prentice Hall, 1995. 341.

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Is" and the words "unless provided as is" should be added to clarify this exception to an equitable adjustment.

(i) *Equitable Adjustment.* Equitable adjustments under this clause shall be made in accordance with the procedures of the Changes clause. The right to an equitable adjustment shall be the contractor's only remedy and the Government shall not be liable to a suit for breach of contract for the following-

(2) Delivery of Government-furnished property in a condition not suitable for its intended use, ***unless provided as is.*** (our suggested language in bold)

Conclusion

From our interpretation of FAR Case 2004-025 and proposed clause 52.245-1; Government-Property, we feel that it should be withdrawn and sent back for revision consistent with our comments stated above. In doing so, we ask that the DAR council give particular consideration to small and disadvantaged businesses that are most likely to be significantly disadvantaged by this proposed regulatory change. If the true intent of the Department of Defense is to simplify and clarify the FAR provisions and clauses relating to government property, as undergraduate students specifically studying this subject matter, we feel that this draft has failed to accomplish its stated purpose. We appreciate the opportunity to provide these comments and welcome any suggestions or questions relating to any aspect of our comments. We may be contacted at CalPolyContracts@yahoo.com or by phone at 951-377-7439.

Sincerely,

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J004-025-19

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2004-025-20

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11/17/2005 11:47 AM

To farcase.2004-025@gsa.gov
cc
bcc
Subject FAR CASE 2004-4-025

November 16, 2005
jimwaak@comcast.net

General Services Administration, Regulatory Secretariat (VIR)
Attn: Laurieann Duarte
1800 F Street, NW, Room 4035
Washington, DC 20405

Re: FAR Case 2004-025

The above FAR Case appears to bring forth sweeping changes not only from the current FAR which in this regard is a welcome change to how the Government and the Contractor will be working as a team, but also by the methodology that has allowed us the private citizen to be interactive in the discussion process that eventuality brought forth the draft final product that I will be commenting on in this letter. In my opinion there was one special person, a Mr. Tom Ruckdaschel of OUSD that through his relenting pursuit of fairness and openness in dealing with the issues at hand led to a sense of community involvement and a product that we can all live with. I am looking forward to the same relationship in the future.

Now having said all of that, there are a few areas that I would like to address that may help strengthen this effort a little more. Relative to those ends, please accept my comments on the referenced FAR case as my concerted desire to achieve the above.

Areas of Concern:

2.101(b) Plant Clearance Officer

This section addresses Special Test Equipment (STE) and Special Tooling (ST). It would seem that if the STE and ST Clauses are to be stricken from the FAR that it would follow that the definitions of STE and ST would also be removed. As property reporting moves towards the financial accounting aspects using the financial terms of Property, Plant and Equipment (PP&E), and all tangible personal property is Equipment, then there would be no further need for these classifications of property.

31.205-19 to (e) to (2) to (iv) Insurance and Indemnification

"Unless .... And/or present an ~~undue~~ risk to the Government, costs of insurance for the risk of loss, damage, destruction, or ~~theft~~ of Government property..."
Replace the word 'undue' with 'material' per the definition in FAR Part 30.602, (48 CFR 9903.305)

025-20

Remove the word 'theft' as it is a subset of 'loss' only known when a fact finding analysis of the loss event has occurred. Suggest the same recommendation where 'theft' is used in other sections such as 32.502-16, Risk of Loss.

45.000 Scope of part

***It does not apply to property under any statutory leasing authority, (except as to non-Government use of ~~plant equipment~~ under 45.301(f); to property…

Replace 'plant equipment' with 'Government property' as used in 45.301(f).

45.101 Definitions

Contractor inventory means—

Re-write and add or delete as noted in following: Same comment for 52.245-1

(1) Any property acquired by or ~~and~~ in the possession of a contractor or subcontractor under a contract for which title is vested in the Government ~~and which exceeds the amounts needed to complete full performance under the entire contract~~; and

(2) ~~Any property that the Government is obligated or has the option to take over under any type of contract, e.g., as a result either of any changes in the specifications or plans thereunder or of the termination of the contract (or subcontract thereunder), before completion of the work, for the convenience or at the option of the Government~~;

Replace with: Any other property that the Government is obligated to take possession of under the instant contract; and…

45.101

Re-write and add or delete as noted in following: Same comment for 52.245-1

Discrepancies incident to shipment means ~~all deficiencies incident to shipment of Government property to or from a contractor's facility whereby differences exist~~ any differences (e.g. count or condition) between the items ~~property purported~~ documented to have been shipped and items ~~property~~ actually received.

45.104(b) Analysis of contractors' property management system

Replace the word 'undue' with 'material' as material can be quantified by industry writings and documents where the word 'undue' is purely subjective.

45.105(b)

Replace the word 'undue' with 'material' and change wording as noted.

"…shall request 'from the Contractor' prompt correction of deficiencies and ~~shall provide~~ a schedule for their completion."

45.501

Delete paragraphs (a) through (d) as they are confusing and appear to allow the Government Property Administrator a privilege to an audit of the Prime's sub-contractor which is out of scope with the privity of contract relationship. Suggest the following:

(a) Where the Prime Contractor requests Support Property Delegation from Defense Contract Management Agency, through the Contract Administration Office, the Government Property Administrator having cognizant over that contract may accept the action their self or in turn

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delegate it to a cognizant GPA already having Prime Contract Administration at the sub-contractor's site.
(b) The Prime Contractor shall accept the findings as produced by the delegated Support Property action and act to correct any deficiencies found per the requirements in Part 45.105 of this regulation.

52.245-1(e) Title to Contractor-acquired property

Replace 'direct item of cost' with "either directly or conditionally based upon sub paragraph (2), (3) and (4) below,"
This is to bring the 'title' issue relative to local and state taxation ability back to the current FAR language which has stood the test of time (and the courts) for a clear understanding of when a taxable event has occurred.

52.245-1(f) Contractor plans and systems

Delete -1(f), -1(f)(i), -1(f)(ii), -1(f)(ii)(A) and -1(f)(ii)(B).
This wording is redundant to 52.245-1(b)(1) and prescriptive in nature which is out of scope with voluntary consensus standards and/or industry-leading practices and standards.

Insert in 52.245-1(b)(1) " The Contractor shall have a system to manage (acquire, receive, control, utilize, preserve, protect, move, repair, maintain, dispose and report of) Government property in its possession."

52.245-1(f)(v) Subcontractor control

Delete words in paragraph starting with, "including any cost savings achieved as a result of its prime contract relationship with the Government."
Has no direct relationship to this FAR Clause, Part and Subpart relative to property control.

Once again, I thank you for the opportunity to be a part of this review and trust that my comments will help to strengthen the FAR re-write for both the Government and the Contractor. Please don't hesitate to contact me at the below number or e-mail should there be any question regard this letter.

James W. Waak
24607 145th Pl S E
Kent, WA 98042
206-276-1265
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FAR Case 2004-025 Waak.doc

The Boeing Company

2004-025-21

November 1, 2005
The Boeing Company

General Services Administration, Regulatory Secretariat (VIR)
Attn: Laurieann Duarte
1800 F Street, NW, Room 4035
Washington, DC 20405

Re: FAR Case 2004-025

BOEING

The above FAR case brings forth sweeping changes from the current FAR and in that regard is a welcome change to how the Government and the Contractor will be working as a team to manage, preserve, protect, control and maintain Government property in the hands of the Contractor.

It is our desire to fully support the effort to simplify FAR Part 45 and related Clauses and provide the use of common and sensible business practices that both benefit the Government and the Contractor in the management of Government property. Relative to those ends, please accept our comments on the referenced FAR case as our concerted desire to achieve the above.

Critical areas of concern are:

52.245-1(d)(3)(iii)

Delete this in its entirety as the unilateral provisioning of 'as is' property is high risk to the Contractor, delays scheduling, increases cost to the Contractor and to the Government and may present a costly event to the Contractor should (upon disposition) the item be determined hazardous.

52.245-1(e) Title to Contractor-acquired property

Replace "direct item of cost" with "either directly or conditionally based upon sub paragraph (2), (3) and (4) below." [*'or optional wording', "FFP and Cost-type Reimbursable Contracts"*].

Although we understand this was not intended as a change to the regulation, the term "direct", along with other regulations which may impact interpretations of this term, introduce enough variability to warrant firm language here and eliminate risk of significant cost impacts to the Contractor and Customer.

52.245-1(f) Contractor plans and systems

Delete -1(f), -1(f)(i), -1(f)(ii), -1(f)(ii)(A) and -1(f)(ii)(B).

This wording is redundant to 52.245-1(b)(1) and prescriptive in nature which is out of scope with voluntary consensus standards and/or industry-leading practices and standards.

Insert in 52.245-1(b)(1) " The Contractor shall have a system to manage (acquire, receive, control, utilize, preserve, protect, move, repair, maintain, dispose and produce reports) Government property in its possession."

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Other Areas of Concern:

The following represents efforts to ensure consistency in passages within the FAR that have relevance to each other.

2.101(b) Plant Clearance Officer and 31.205-40 [Amended]

This re-write of the Plant Clearance Officer definition appears to attempt to redefine the duties of the PlCO as well as address specifically GOCO's and Federal installations. It also brings in a new term called 'Contractor Inventory'. Without additional definitions as to what is meant by Contractor Inventory, it would seem that the current definition at FAR Part 2.1 as written: "Plant clearance officer" means an authorized representative of the contracting officer appointed to disposition property accountable under Government contracts" may be a better fit.

This section further addresses Special Test Equipment (STE) and Special Tooling (ST). It would seem that if the STE and ST Clauses are to be stricken from the FAR that it would follow that the definitions of STE and ST would also be removed. As property reporting moves towards the financial accounting aspects using the financial terms of Property, Plant and Equipment (PP&E), and all tangible personal property is Equipment, then there would be no further need for these classifications of property.

This section also defines Voluntary Consensus Standards and as such, we embrace this concept whole heartedly. It would, however, for consistency in FAR language make sense to use the verbiage as spelled out in FAR Part 11.101(c) in its entirety.

31.205-19 to (e) to (2) to (iv) Insurance and Indemnification

"Unless .... And/or present an ~~undue~~ risk to the Government, costs of insurance for the risk of loss, damage, destruction, or ~~theft~~ of Government property..."

Replace the word 'undue' with 'material' per the definition in FAR Part 30.602, (48 CFR 9903.305)

Remove the word 'theft' as it is a subset of 'loss' and only known when a fact finding analysis of the loss event has occurred. Suggest the same recommendation where 'theft' is used in other sections such as 32.502-16, Risk of Loss.

45.000 Scope of part

***It does not apply to property under any statutory leasing authority, (except as to non-Government use of ~~plant equipment~~ under 45.301(f); to property...

Replace 'plant equipment' with 'Government property' as used in 45.301(f).

45.101 Definitions

Acquisition cost means--, (2), second paragraph, "Common item means material....Contractor's work." Same comment for 52.245-1

Delete this paragraph in its entirety as it is superfluous to acquisition cost.

45.101

Contractor inventory means—

Re-write and add or delete as noted in following: Same comment for 52.245-1

(1) Any property acquired by or ~~and~~ in the possession of a contractor or subcontractor under a contract for which title is vested in the Government ~~and which exceeds the amounts needed to complete full performance under the entire contract~~; and

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(2) ~~Any property that the Government is obligated or has the option to take over under any type of contract, e.g., as a result either of any changes in the specifications or plans thereunder or of the termination of the contract (or subcontract thereunder), before completion of the work, for the convenience or at the option of the Government~~;
Replace with: Any other property that the Government is obligated to take possession of under the instant contract; and…

45.101

Demilitarization means rendering ~~a product designated for demilitarization~~ unusable for, and not restorable to, the purpose for which…

Replace the strike out with – 'equipment or material'. Same comment for 52.245-1

This is to keep the terminology in line with the concept of PP&E and removes a term not usual and customary in this part of the FAR.

45.101

Re-write and add or delete as noted in following: Same comment for 52.245-1

Discrepancies incident to shipment means ~~all deficiencies incident to shipment of Government property to or from a contractor's facility whereby differences exist~~ any differences (e.g. count or condition) between the items ~~property purported~~ documented to have been shipped and items ~~property~~ actually received.

45.104(b) Analysis of contractors' property management system

Replace the word 'undue' with 'material'

45.105(b)

Replace the word 'undue' with 'material' and change wording as noted.
"…shall request 'from the Contractor' prompt correction of deficiencies and ~~shall provide~~ a schedule for their completion."

45.501

Delete paragraphs (a) through (d) as they are confusing and appear to allow the Government Property Administrator a privilege to an audit of the Prime's sub-contractor which is out of scope with the privity of contract relationship. Suggest the following:

(a) Where the Prime Contractor requests Support Property Delegation from Defense Contract Management Agency, through the Contract Administration Office, the Government Property Administrator having cognizant over that contract may accept the action their self or in turn delegate it to a cognizant GPA already having Prime Contract Administration at the sub-contractor's site.

(b) The Prime Contractor shall accept the findings as produced by the delegated Support Property action and act to correct any deficiencies found per the requirements in Part 45.105 of this regulation.

52.245-1(f)(v) Subcontractor control

Delete words in paragraph starting with, "including any cost savings achieved as a result of its prime contract relationship with the Government."
Has no direct relationship to this FAR Clause, Part and Subpart relative to property control.

2004-025-21

Once again, we thank you for the opportunity to be a part of this review and trust that our comments will help to strengthen the FAR re-write for both the Government and the Contractor. Please don't hesitate to contact me at the below number or e-mail should there be any question regard this letter.

Rebecca A. Andert
Director - Government Property Management
Rebecca.a.andert@boeing.com
(314) 234-5879

2004-025-22

Wyborski.Larry@epamail.epa.gov
11/17/2005 02:06 PM

To farcase.2004-025@gsa.gov
cc
bcc
Subject FAR case 2004-025

November 16, 2005

General Services Administration
FAR Secretariat (MVA)
1800 F Street, NW, Room 4035
ATTN: Laurieann Durate
Washington, DC 20405

Dear Ms. Durate,

Thank you for the opportunity to comment on the proposed rule to amend Part 45 of the Federal Acquisition Regulation (FAR) relating to Government Property. The Environmental Protection Agency (EPA) has reviewed the proposed rule, FAR Case 2004-025, that was published in the Federal Register on September 19, 2005.

We offer the following comments for your consideration.

1. Reference FAR 45.105(b)(1) - We do not believe that a contract price adjustment is an appropriate remedy to be used if a contractor fails to correct cited deficiencies in the time frame established by a corrective action schedule for the following reasons:

- It would be very difficult to quantify the contract price adjustment associated with the failure to correct system deficiencies in a timely manner.

- EPA does not have Administrative Contracting Officers, who could compute the total contract price adjustment (for all contracts) associated with a contractor's failure to take required and timely corrective actions. Therefore, the Contracting Officer for each contract would have to determine whether a contract price adjustment is appropriate. This could lead to inconsistent treatment from one contract to another.

- The use of contract price adjustments could result in extensive litigation being brought forth by contractors.

- Contractors who fail to make timely corrections to deficiencies cited in other system reviews (i.e., estimating systems, labor systems, purchasing systems) are not subject to contract price adjustments. This creates another consistency issue.

- Other alternatives can be used, in lieu of contract price adjustments, to encourage contractors to correct their cited deficiencies in a timely manner (see FAR 45.105(b)(2) and (3)).

2. The proposed rule indicates that the Government intends to

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rely heavily on the contractors' commercial practice to manage and dispose of Government property. However, commercial contractors do not provide property to other contractors under their contracts. Instead, contractors have developed procedures designed to dispose of their own property. It is therefore unclear, how the use of "commercial practices" will apply to the management of Government property under Government contracts.

3. The previous language in FAR 45.302-1 effected a broad prohibition on furnishing property to contractors, with very limited exceptions. The proposed language in FAR 45.102(b) simply states that Contracting Officers shall provide property to contractors when it is clearly demonstrated: (1) to be in the government's best interest; (2) the benefit outweighs the increased cost of administration; (3) providing the property does not substantially increase the Government's risk; and, (4) the government's requirements cannot otherwise be met. We are concerned that the proposed rule will make furnishing property to contractors much easier administratively, and consequently will result in more Government property being furnished to contractors.

If you have questions or require additional information, I can be reached on
(202) 564-4315, or you may have a member of your staff contact Larry Wyborski in our Policy and Oversight Service Center on (202) 564-4369, or email

Sincerely,

/s/
Ronald L. Kovach, Director
Policy, Training and Oversight

Division

Office of Acquisition

Management

2004-025-23

"Shultz, Richard R."
<Richard.Shultz@jhuapl.edu>
11/17/2005 03:32 PM

To farcase.2004-025@gsa.gov
cc
bcc
Subject FAR case 2004-025

Administration, Regulatory Secretariat (VIR)
1800 F Street NW, Room 4035
Washington DC 20405

Attn: Laurieann Duarte

Subject: FAR Case 2004-025

I am the Section Supervisor for Property Management Section at the Johns Hopkins University Applied Physics Laboratory. One of my responsibilities is to ensure there is a system in place to effectively manage Government property. I would like to comment on FAR case 2004-025, which is the proposed ruling to "simplify procedures, clarify language, and eliminate obsolete requirements related to the management and disposition of Government property in the possession of contractors".

The proposed ruling has indeed simplified procedures, clarified language, and eliminated obsolete requirements. Two requirements which are proposed to be eliminated are FAR clauses 52.245-8 (Liability for the Facilities) and 52.245-11 (Government Property (Facilities Use). These clauses allow contractors to manage property on one contract (contract only for the purpose of managing Government property, no money is associated with this contract). JHU/APL currently has a Facilities type contract and as a not-for-profit organization we find it to be a very useful tool for managing much of our Government owned property. Over 99% of the work being performed at JHU/APL is financed through the Government and having a Facilities type contract in place saves the Government both time and money. Property on this contract currently supports over 150 Government tasks, across multiple agencies. The elimination of the Facilities Use type contracts will have a negative impact on how we currently manage Government property. Please reconsider the elimination of FAR clauses 52.245-8 and 52.245-11.

The use of voluntary consensus standards and/or sound business standards would be a major improvement for managing Government property if Contractors didn't have to account for all Government owned property upon contract completion or termination (proposed clause 52.245-1(f)(x). Contractors typically do not tag and record contractor owned equipment under their depreciation threshold. Currently, contractors must track a $100 Government owned item for the life of the item or until contract completion. The labor cost to manage this item greatly exceeds the acquisition cost. The Government should consider a dollar threshold and apply this sound business practice to Government owned property. The Government would save labor hours for Contractor personnel tracking low dollar items.

I appreciate the opportunity to respond to FAR case 2004-025. If additional information is required please contact me at 443-778-5585.

Sincerely,

Richard Shultz
CPPM, CHAMP
Section Supervisor – Property Management

2004-025-24

Alliant Techsystems Inc.
5050 Lincoln Drive
Edina, MN 55436-1097

November 17, 2005

General Services Administration
Regulatory Secretariat (VIR)
1800 F Street, NW
Room 4035
Attn: Laurieann Duarte
Washington, DC 20405

Ref. FAR Case 2004-025 (Government Property)
By e-mail: farcase.2004-025@GSA.gov

Dear Ms. Duarte:

ATK has participated in the continuing process of acquisition reform for the management of government property during the last ten years. We are appreciative to the many people within the agencies who have strived for mutually beneficial enhancements during that time, and believe embracing best commercial practices and standards will result in a successful outcome for both government and industry. ATK has reviewed the proposed rule on Government Property (FAR Case 2004-025) and in the spirit of mutual cooperation, offers comments on the following areas:

Access to Contractor Internal Audit and Reviews Records [Proposed FAR 52.245-1(f)(3)]

We believe the proposed FAR language may be interpreted to require mandatory furnishing of internal audit and review documentation to the government, and access to the entire property management system, which includes a contractor's property, commercial property and other non-government property. We recommend these requirements be revised to clearly indicate access to a contractor's internal audits and reviews will be limited to information related directly to government property.

Identification of "As Is" Government Property in Solicitation [Proposed FAR 45.201(a)]

We suggest an additional enumerated item related to "as is" government property be added to the current proposed list. ATK believes that a solicitation related to a fixed price contract should clearly identify the property the government proposes to supply in an "as is" condition and should also provide all material information concerning the property's condition in order to allow a contractor to provide a responsible bid or proposal.

Disposition of Government Property Not Suitable for Intended Use [Proposed FAR 52.245 (d)(ii)]

ATK believes the equitable adjustment approach and procedure currently described in FAR 52.245-2(a)(3) is a more equitable method to deal with government property that is in a condition not suitable for its intended use when compared to the currently proposed language. Since the property is owned by the government, the decision concerning an appropriate action should rest with the Contracting Officer rather than have him act as an advisor to a Contractor. In addition, since the work is being undertaken at the Contracting Officer's direction and the benefit flows directly to the government property any action should clearly be at government expense. For these reasons ATK suggests replacing the proposed language with the language presently in FAR 52.245-2(a)(3). As an alternative, ATK suggests the current proposed language be modified as follows:

> In the event property is received by the Contractor in a condition not suitable for its intended use, the Contracting Officer shall, upon the Contractor's timely written request, issue directions to the Contractor on a course of action to remedy the problem. Such directions may include repairing, replacing, modifying, returning, or otherwise disposing of the property at the Government's expense.

2004-025-24

> Upon completion of the required action(s) by the Contractor the Contracting Officer shall make an equitable adjustment to the contract for the action(s) performed (see also paragraph (f)(1)(ii)(A) of this clause).

Facilities Contracts

The proposed language will eliminate coverage of facility type contracts, and service contracts are identified to meet the future requirements. ATK recommends that the proposed service contracts would have standard template terms and conditions for the management of government property under these contracts for consistency through the various government agencies.

Abandonment of any Nonsensitive Government Property

The proposed language provides the government the unilateral authority to abandon any non-sensitive government property in place. Such a government action may create a substantial additional cost for contractors. ATK recommends that the proposed language be modified to require a contractor's consent before the government may abandon any of its property.

Conclusion

ATK recognizes that transition from the present FAR method of managing government property to the new rule will require significant resources, and adequate time for implementation should be factored when establishing the effective date of the new rule. In addition, robust training for both government and industry personnel will be required before and during the implementation phase.

We appreciate the opportunity to provide comments on this proposed rule related to the management of government property, and hope that our comments will be of assistance in further defining and clarifying the roles of the government and industry in relation to this important government contract subject.

Sincerely,

ALLIANT TECHSYSTEMS INC.

Dianne Deering
Vice President, Contracts and Strategic Agreements

DD/lrs

2004-025-25

GENERAL ATOMICS

November 17, 2005

General Services Administration
Regulatory Secretariat (VIR)
1800 F Street, NW
Room 4035
Washington, D.C. 20405

Attention: Ms. Laurieann Duarte

RE: Proposed Changes to Government Property Provisions – FAR Case 2004-025

Dear Ms. Duarte:

I am submitting these comments pursuant to 70 F.R. 54878, September 19, 2005, with respect to proposed revisions to the FAR addressing government property. My comments relate exclusively to the issue of passage of title to property accounted for as indirect charges applied to cost-type and time-and-material contracts. The proposed changes to the title clause will overturn established state case law, and result in substantial increases in state sales and use taxes charged to U.S. Government contracts. For the reasons explained below, we believe that the government title provisions applicable to cost-type and time-and-material contracts should be retained as written and not be revised as proposed.

1. Case Law has firmly established that state sales and uses taxes do not apply to indirectly charged property when the appropriate title clause is present in a government contract.

The proposed change to eliminate FAR 52.245-5 in its entirety, and specifically FAR 52.245-5(c), and replace it with a new government property clause, FAR 52.245-1, would eliminate the passage of title to the government of indirectly charged property under cost-type and time-and-material type U.S. Government contracts. Case law beginning in California in 1990 has established that title to indirectly charged property passes directly to the U.S. Government when FAR 52.245(c)(3) is present in a contract. Aerospace Corp. v. State Board of Equalization, 218 Cal. App. 3d 1300 (1990); McDonnell Douglas Corp. v. Director of Revenue, 945 S.W. 2d 437 (Mo. 1997) (en banc); Motorola, Inc. v. Arizona Department of Revenue, 993 P. 2d 1102 (Ariz. Ct. App. 1999); Bath Iron Works v. State Tax Assessor, No. AP-00-80 (Me 2000); Strayhorn v. Raytheon E-Systems, Inc., 101 S.W. 3d 558 (Tex. Ct. App. 2003), petition for review denied, 2003 Tex. LEXIS 320 (Tex. 2003). Consequently, the application of state sales or use taxes to such property that is indirectly charged according to a reasonable allocation system violates the constitutional immunity of the U.S. Government to state taxation.

2. If the proposed regulation FAR 52.245-1 is adopted, a two-tier tax application will result in which indirect consumable property charged to a fixed-price government contract with a progress payments clause will be exempt from state and local sales and use tax, and that same indirectly charged consumable property will be subject to state and local sales and use tax when charged to a cost-type or time-and-material government contract.

In fixed-price type contracts containing the Progress Payments Clause FAR 52.232-16, title to direct consumable supplies and indirectly charged supplies and materials is passed directly to the U.S. Government by operation of the clause. This Progress Payments Clause will not be affected by adoption of the proposed regulation. As a consequence, state and local sales and use taxes will apply inconsistently to indirectly charged property depending upon whether it is purchased pursuant to a fixed-price government contract with the progress payment clause -- non-taxable, or to either a cost-type or time-and-materials contract – taxable. This makes no sense whatsoever: there should be internal consistency within the regulations to avoid this illogical result.

3. Adoption of the proposed regulation FAR 52.245-1 will result in a tremendous loss of federal dollars for much-needed defense and research programs that are funded through U.S. Government contracts.

Government appropriations are made available to various government departments and agencies each year for the purpose of funding projects of national importance. With increasing constraint on the federal budget, every available dollar is needed to fund a vast array of programs in areas including defense, energy, science, and health. Revision of the government property title clauses would have the effect of transferring vast amounts of federal government resources directly to state and local governments at the expense of critical federal programs. For example, in California, where sales and use taxes average about 8.00% depending on the county, for every million dollars of funds expended for indirectly charged property, an additional $80,000 of taxes will be due. To put this in perspective, if a company were to indirectly charge 10,000,000 for property required to perform a government cost-type contract in a year, an additional amount of $800,000 would be required to pay taxes to state and local governments. The alternative would be to reduce critical spending on vital government programs. Certainly, this cannot be the intention of the drafters of the proposed regulation affecting title to government property.

Conclusion

For the reasons stated above, we believe that the portion of FAR 52.245-1 relating to title, specifically FAR 52.245-1(e), should not be adopted as proposed, but should be retained as currently written in FAR 52.245-5(c) to preserve the well-established regulatory and case law treatment of government property. Courts in several states, as cited above, have painstakingly established that the property title clause found at FAR

2004-025-25

52.245-5(c)(3) effectively transfers the title to indirectly charged property directly to the U.S. Government when costs are appropriately and reasonably allocated to cost-type and time-and-material government contracts. As a result, such property is titled in the U.S. Government when purchased and is afforded constitutional immunity from state and local sales and use tax.

In summary, we believe that the title provisions as currently written should be retained:

1. To avoid unnecessary additional costs, or reduction of funds, for vital government programs;

2. To avoid unnecessary and cumbersome administration of two different tax regimes that will apply to fixed-price contracts with a progress payments clause, and to cost-type and time-and-material contracts; and,

3. To avoid doing serious damage to well-established principles of law related to government title provisions developed over many years.

(Please note, the language of proposed FAR 45.401 will require revision to make it consistent with the retention of FAR 52.245-5 as it is currently written.)

Thank you for providing this opportunity for comment.

Sincerely,

Susan Shafi

Susan N. Shafi
State and Local Tax Specialist

2004-025-26

no-reply@erulemaking.net
11/18/2005 05:13 AM

To farcase.2004-025@gsa.gov
cc
bcc
Subject Public Submission

Please Do Not Reply This Email.

Public Comments on Federal Acquisition Regulation; Government Property:========

Title: Federal Acquisition Regulation; Government Property
FR Document Number: 05-18516
Legacy Document ID:
RIN:
Publish Date: 09/19/2005 00:00:00
Submitter Info:

First Name: James
Last Name: Taylor
Mailing Address: 6201 Conklin Way
City: Haymarket
Country: United States
State or Province: VA
Postal Code: 20169
Organization Name: USAF

Comment Info: ==========

General Comment:I am submitting my following comments to the FarCase 2004-025 for the rewrite of FAR Subpart 45.

45.101 Definitions

It is highly recommended that a definition for Information Technology Equipment (ITE) be included. Even though this definition is a subset of the definition for Equipment, it becomes extremely important what it comes to being compliant to the CFO Act 1990. When an agency is preparing their financial sheets and they are calculating the depreciation for property using IRS guidelines for depreciation, they will find that different types of equipment have different depreciation rates. General equipment has a depreciation rate over five years and computer or IT equipment is depreciated over three years. To enable an agency to comply with the requirements of the CFO Act of 1990 the agency should have the ability to depreciate the equipment at the appropriate rate.

45.103 General

825-26

a(1) Voluntary consensus standards that are currently in print would not be efficient to protect the government interest. One of the major concerns with using the standards is that neither the government nor the contractors really understand to impact of using these standards. Another area that is unclear is will the contractors be required to go to a voluntary consensus standard if for the past twenty plus years the contractor?s property control system has met or exceeded the requirements of FAR Subpart 45.5. Would this not be an acceptable standard since most of the DoD contractor have met this requirement. We do not see what the benefits would be if the contractors have to spend money to change their systems to meet a consensus standard when they already have acceptable systems in place, the government would most likely bear the cost of changing these systems. For example: One problem develops when we have "inconsistency in the preeminent standard" to be used. One problem develops when we have "inconsistency in the preeminent standard" to be used. For example, if Raytheon is using ISO; Northrop Grumman is using Six Sigma; Boeing is using ASTM, LMC is using ABC, then which standard takes precedence to truly authenticate compliance? Another problem develops because the Property Administrator must become knowledgeable of "all standards" because there is universal oversight of many of the same customers (i.e., Raytheon, NG, etc). Another problem develops when FAR is replaced with a contractor based standard for application to a government operation. Therein resides a "conflict" since contractors cannot audit other contractors "for the government" and "hold the government liable" according to the commercial standard. Another problem develops when there is a dispute regarding the processes that defines the standards. In the past, the DoD Manual was written in support of the FAR requirements for PA analysis (audit) of the contractor's systems for controlling government property. Further controls were supplanted in the DoD FAR Supplement. The question: If contractor metrics ASTM, ISO, etc) are used "by the government" to monitor contractor compliance, what precedent does the FAR, DoD Supplement, and DoD Manual have in relationship to the contractor based metrics?

52.245-1 Government Property

It is highly recommended that a definition for Information Technology Equipment (ITE) be included. Even though this definition is a subset of the definition for Equipment, it becomes extremely important what it comes to being compliant to the CFO Act 1990. When an agency is preparing their financial sheets and they are calculating the depreciation for property using IRS guidelines for depreciation, they will find that different types of equipment have different depreciation rates. General equipment has a depreciation rate over five years and computer or IT equipment is depreciated over three years. To enable an agency to comply with the requirements of the CFO Act of 1990 the agency should have the ability to depreciate the equipment at the appropriate rate.

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(b) Property Management

Add to (b)(1) the word procedures after systems. The contractor system includes processes and procedures.

There appears to be a conflict or some confusion between what is written in the clause via FAR 45.106 (Transferring accountability). The clause states in (d) (iii) 4(i) that the contracting officer may be written notice, at any time (A) increase or decrease the amount of government furnished under this contract. 45.106 states ?such transfers shall be documented by modifications to both gaining and losing contracts. So my questions are which one is it? Either you transfer by written notice (by the way what is meant by a written notice contracting officer letter) or you transfer by issuing a modification to the contract (should not the modification be bi-lateral and not unilateral, most contracting officers want to do unilateral). Does a written notice become part of the contract or do you have to incorporate it into the contract by modification?

Under f(iii) records of government property, please explain what the meaning of (9) posting reference and date of transaction really means. Everyone see this different. Maybe is should read (the document that caused the transaction and the date the transaction occurred).

f(x) Property closeout

Move (2) and (3) from this section it does not belong under property closeout. (2) and (3) should be moved to (f) contractor plans and system.

What are the benefits of requiring the contractor to accomplish self audits? If we are now requiring the contractor to perform this function who is going to pay the cost of those self audits. With contractor?s increasing overhead burden rate this is going to cost the government more money than if the property administrator accomplishes the same tasks. How would the PA know if the information given by the contractor is accurate and complete?

(iv) Physical Inventory

It is somewhat unclear when a contractor is to inventory the government property? Does the contractor inventory based on their procedures or does the contractor need to submit their inventory plans to the property administrator for concurrence? It appears that the contractor determines what periodically means.

We totally agree with doing away with the additional property clauses since

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for the most part those issues can be handled under the government property clause 52.245-1. We agree with deleting the special tooling clause 52.345-17, this clause has been misused since it was written in the 1980s. For one this clause can only be used on Fixed Price contract and it is normally only used on production contracts. The problem with this clause is that the money negotiate under the contract is to be used for only unidentifiable special tooling, here lays the problem. 99.99% of all production contracts go through some type of research and development before they go to production. By the time the item is ready for production the contractor already know what special tooling they will need to product the number of items on the contract. So if the contractor already knows doing negotiations what special tooling they need it should not be under the Special Tooling Clause but the government property clause. The unidentifiable special tooling would be that tooling that comes about through some engineering change to the item. Eventhough the Special Tooling clause has appeared to work in the past the one area that should be of concern is the millions of dollars the contractors have been paid without any special tooling being purchased. It like having an insurance policy where if the contractor spends more than what has been negotiated the contractor is then responsible for the additional cost of the special tooling. That would be the insurance but I am not aware of any contractor having to spend their own money to purchase special tooling on a government contract. Of course any money left over that the contractor did not spend would be extra profit.

In closing we will have to say that even though FAR Subpart 45 has needed to be rewritten for a long time, but it also needed to be written with a common sense approach. We are not sure that going to consensus standards is the way to go either. Most of the standards (ATSM) that we have read on property are incomplete or do make sense from the point of being a tax payer. We feel it is appropriate for the government to set its our requirements to ensure being good stewards of tax payers money. Maybe the way to go is for the government to set the standard which they really did under the old FAR subpart 45.5.

Thank you for the opportunity to submit my comments.

James Taylor

Property Analyst

2004-025-27

GSA

Roman J.
Marciniak/FBP/CO/GSA/GOV
11/18/2005 02:04 PM

To farcase.2004-025@gsa.gov

cc Robert A. Holcombe/MTP/CO/GSA/GOV@GSA, David M. Robbins/FBP/CO/GSA/GOV@GSA

bcc

Subject FAR Case 2004-025

Reference: 52.245-1(j)(1)(A): "The Contractor may dispose of scrap resulting from production or testing under this contract without Government approval."

Comment: The term, "scrap" should be defined. Without a definition, the authority of the contractor to declare as scrap property resulting from production or testing may be abused, and usable property may be wasted.

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Property Management Division
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2004-025-28

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College of Business Administration

November 17, 2005

Ms. Laurieanne Duarte
FAR Secretariat
General Services Administration
Regulatory Secretariat (VIR)
1800 F Street NW
Room 4035
Washington, DC 20405

Faxed to 202-501-4067

Re: Proposed Changes to Government Property Provisions-
FAR Case 2004-025

Dear Ms. Duarte:

The following comments are proffered pursuant to 70 F.R. 54878, FAR Case 2004-025 (September 19, 2005), with respect to its proposed revisions to the FAR's provisions regarding government property. My comments will specifically address the proposed changes that would (1) result in the government not acquiring title to overhead or indirect cost property (hereafter overhead property) in cost reimbursement contracts; and (2) the potential adverse ramifications in providing contracting officers with unlimited discretion in inserting the "as is" government property clause in cost reimbursable contracts while not affording a pre-contract right of inspection. I will also address one potentially beneficial ramification of this new FAR Case – that the creation of the new "Mega government property" clause may finally resolve the question whether the government property clause should be read into a contract by operation of law under the *G.L.Christian* Doctrine.

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My students in the undergraduate contract management program at California State Polytechnic University, Pomona, California, in accompanying comments, will likewise be submitting their views regarding potential negative ramifications of this FAR case. In a nutshell, both my students and I conclude that the aforementioned FAR Case should be withdrawn and reconsidered with respect to these submitted comments.

I. Negation of Title to Overhead Property Under Cost Reimbursement Contracts.

A. The Contractor Cases Establishing That the Federal Government Has Title to Overhead Property and the Covey Affidavit Reaffirming That Premise

In my recent article, "The 'Three Musketeers' of Overhead Property: *Motorola*, *Hughes* and *Raytheon* Cases", I outlined the common arguments and legal reasoning of these landmark decisions that successfully proved that under both cost reimbursement and fixed price contracts financed with progress payments that the federal government acquires title to overhead property. As stated in my article, a very significant event occurred in the *Raytheon* decision, where, for the first time, the government finally went on record that it agreed with the reasoning of these overhead property advocate cases. The "statement of record" was the affidavit of Ms. Carol Covey, deputy director of procurement in the Office of the Under Secretary of Defense for Acquisition, Technology, and Logistics, which was admitted into evidence. In unequivocal language Ms. Covey painstakingly outlined the government's forthright position that it intends and does in fact take title to overhead property, both in cost-reimbursement and fixed-price contracts with progress payments. Thus, the record appeared to be quite settled, at least as to DoD contracts, that the overhead property, regardless of the contract type by which it was acquired, is property owned by the government.[1]

B. How the "Mega Clause" Undermines the Indirect Cost Linkage

The principal thread within the common legal reasoning of the cases recognizing government title to indirect cost property in cost reimbursement contracts is the "indirect cost linkage of 52.216-7 ("Allowable Costs and Payment ") clause and 52.245-5(c)(3) ("Government Property (Cost-Reimbursement, Time-and-Material, of Labor-Hour Contracts") clause. Simply put, 52.216-7 reaffirms that by the government paying for properly allocable, allowable and reasonable indirect costs, the government has bought "something". What the "something" is that the government has bought is answered in 52.245-5(c)(3) by its language that:

(3)*Title to all other property* (other than direct cost property, which is addressed in FAR 52.245-5(c)(2)) *the cost of which is reimbursable to the contractor, shall pass to and vest in the government*...(emphasis added).

(Note FAR 52.245-5, Subpart (2) addresses title to all property purchased by the contractor for which the contractor is entitled to be reimbursed as a **direct item** of cost.

[1] Ms. Covey's affidavit declares her authority to speak for the Department of Defense.

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Therefore, by negative implication, "other property" would have to refer to indirect cost or overhead property).

The proposed FAR revision would destroy the indirect cost linkage by eliminating 52.245(c)(3) and instead substituting the new "Mega Government Property Clause" at 52.245-1, which would provide in pertinent part:

(e) Title to Government Property Acquired by the Contractor

(1) Title to all property purchased by the contractor, for which the contractor is entitled to be reimbursed *as a direct item of cost (see the "Allowable Cost and Payment" clause of this contract)*, under this contract, shall pass to and vest in the Government upon:

(i) a vendor's or supplier's delivery of such property to the contractor;
(ii) issuance of the property for use in contract performance, including installation of parts through normal maintenance;
(iii) commencement of processing of the property for use in contract performance; or
(iv) reimbursement by the Government for the cost of the property, whichever occurs first.
(2) *Paragraph (e)(1) of this clause shall not apply to property purchased by the contractor for performance of fixed-price contracts or fixed-price line items.* (emphasis added in italics).

Again, the potential ramification of FAR Case 2004-025 and the "Mega-Government Property" Clause is that it eliminates the indirect cost linkage between FAR 52.216-7 and FAR 52.245-5 – meaning that the government would not take title to overhead cost property under cost reimbursable contracts. It does this by a two stroke mechanism. First, this "Mega-Government Property" clause eliminates the current "Government Property (Cost-Reimbursement, Time-and-Material or Labor-Hour Contracts) clause currently found at FAR 52.245-5. Second, the proposed Mega-Government Property clause (again, it would take the place of current FAR 52.245-5) specifically limits the government to obtaining title only when the property is acquired as a **direct item of cost. Now the question becomes why?**

C. What Happened to the Covey Affidavit and Why the Negation of Taking Title To Overhead Property In Cost Reimbursement Contracts?

The proposed FAR case changes are of particular concern in that the net effect is that the government would still acquire title to overhead property under fixed-price contracts with progress payments[2] but not under cost reimbursement contracts which amounts to a distinction which logically defies the reason for its existence. And, this is done **without any reference to the Covey affidavit** which purported to be an official statement of the United States Department of Defense regarding the indirect cost property title issue. We can only ask why is the Covey affidavit being completely ignored? Could the right hand of the government not be aware of what the left hand is doing? Again, if the whole point of the FAR Case is to have the government NOT take title to overhead property, then why limit the negation of title in cost reimbursable contracts? Why does

[2] *See* Nash *Postscript IV: Title to Overhead Items, 19 N&CR 11,* at 50, where the author agrees that this FAR case does not resolve the question of taking of title to overhead property via the progress payments clause under fixed-price contracts.

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this proposed FAR Case not negate the government taking title to indirect cost progress payments property under fixed price contracts? Ms. Covey painstakingly clarified DoD's position that the government has title to overhead property regardless of contract type, which this author adamantly asserts is correct . Why is now the FAR council retreating from such a forthright declaration? Inquiring minds want to know.

II. Proposed FAR Case Would Allow Government to Designate Property "As Is" Without a Pre-Contract Right To Inspection Under Cost Type Contracts.

As noted in the comments of Richard C. Johnson Esq. this new Mega Property clause affords the government an unlimited option to include the 'As Is" provisions. Currently such a clause (52.245-19) can only be used in fixed price, time and materials and labor hours contracts and not cost reimbursable contracts. As Johnson correctly asserts, the effect of this Mega clause would be allow the government to designate property "As Is" while not affording contractors a right to a pre-contract inspection in cost type contracts.[3] Such a result would undermine the most fundamental precept of cost reimbursement contracting that a contractor is to have less risk.[4]

III. The "Mega-Property" Clause Might Finally Resolve the Issue of Christian Doctrine Incorporation By Operation of Law

For many years, there has been conflicting case law as to whether the various primary government property clauses (e.g. 52-245-2 and 52-245-5) were incorporated by operation of law under the *G.L. Christian* Doctrine[5] with cases saying both pro and con.[6] For example, in the *Chamberlain Manufacturing Corporation* decision, the Armed Services Board of Contract Appeals found that the government property clause was not to be read in by operation of law since the common law of bailment was a suitable substitute. However, the same board in the *Dayron*[7] and *Hart's Food Service*[8] decisions concluded that the applicable property clause was to be read in by operation of law. Applying the "*Christian* Doctrine Incorporation Standard" as outlined by the United States Court of Appeals for the Federal Circuit in the *General Engineering & Machine Works v. O'Keefe*[9], only clauses that are indicative of a deeply engrained fundamental procurement policy will be incorporated into a contract by operation of law. The combining of all primary property clauses into a "Mega clause " should assure that the

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[3] See Comments of Richard C. Johnson, Smith Pachter McWhorter & Allen, "Regarding Proposed Changes to Government Property Provision FAR Case 2004-025" September 20, 2005 at p. 4.
[4] Johnson notes that such a result is the "contracting world turned upside down".
[5] *G.L. Christian and Associates v. United States*,. 160 Ct. Cl. 1, 312 F. 2d 418, *reh'g denied*, 160 Ct. Cl. 58, 329 F. 2d 345, *cert. denied*, 375 U.S. 954 (1963); *see also* Wyatt , "The Christian Doctrine: Born Again But Sinfully Confusing" *Contract Management*, November 1993
[6] ASBCA No. 18, 74-1 BCA 10,368 (1973); *see also* Wyatt, "Is the Government Property Clause Second Rate?" *The Property Professional*, December 1993
[7] ASBCA No. 24,919, 84-1 BCA 17,213 (1984)
[8] ASBCA Nos. 30756, 30757, 84-2 BCA 21,789 (1989)
[9] 991 F.2d 775 (Fed. Cir. 1993).

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new 52.245-1 would be elevated to the status of a clause worthy of *Christian* Doctrine incorporation.

IV. Conclusion

For all of the aforementioned reasons, I respectfully request that this proposed FAR Case be withdrawn and reconsidered by the FAR council. If any questions should arise concerning my comments, please do not hesitate to contact me at ContractMgmtProf@aol.com or by phone at 951-377-7439.

Respectfully submitted,

John B. Wyatt III JD
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2004-025-29

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November 18, 2005

General Services Administration
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Attn: Laurieann Duarte
Washington, DC 20405

Ref: FAR Case 2004-025 (Government Property)

By email: farcase.2004-025@gsa.gov
By fax: 202-501-4067

Dear Ms Duarte:

I appreciate the opportunity to provide comments on the proposed rule on Government Property (FAR Case 2004-025), published in the *Federal Register* on September 19, 2005.

The Councils requested comments on the instances in which there is a continued need for coverage with regard to facilities type contracts.

The Councils should carefully consider the impact of the elimination of facilities use contracting on tenant use agreements entered into under the authority of the Armament Retooling and Manufacturing Support (ARMS) Act (10 USC 4551 - 4555). An easily read and understood explanation of the purpose of the ARMS program is found at http://www.lcaap.com/Pages/armsinfor.htm, a website associated with Lake City Army Ammunition Plant. The statutory language is a bit confusing because the tenants are referred to as "subcontractors," since they derive the right to use the federal facilities that they occupy from their Use Agreement with the Army's facilities use contractor.

Under the authority of the ARMS Act, and more particularly10 USC 4554(a)(1) and (3), the Army's facilities use contractors at Lake City AAP, Radford AAP, Lone Star AAP, Kansas AAP, Mississippi AAP, Iowa AAP, Milan AAP and other locations have been encouraged by the Army to seek out commercial enterprises (often small businesses) to become tenants at these facilities under Tenant Use Agreements, some of which have terms that extend well beyond the assured tenure of the facilities use contractor. The Tenant Use Agreements may (with Army approval) extend for a term of up to 25 years, per 10 USC 2554(a)(3)(A).

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The Army (through the ARMS Act) has provided millions of taxpayer dollars to refurbish these facilities for the use of these tenants, and in some cases the tenants invested significant sums of their own money. It is my understanding that most of the Tenant Use Agreements are tied to the Facilities Use Contracts and are dependant upon their continuation. In most cases, the Army gave assurances to the facilities use contractor that if the contractor were replaced, the Army would cause the successor contractor to assume and honor the Tenant Use Agreements. It is not clear how carefully the parties considered the issue of what would happen if there were no successor facilities use contractor.

In return for the Army's investment, the tenant use fees paid to the facility use contractor have reduced the maintenance costs that the Army would otherwise have had to bear in order to maintain these munitions production facilities for their mobilization mission.

May I respectfully suggest that it would be unwise to eliminate facilities use contracting without carefully and fairly considering and addressing the impact of such a move on tenant use agreements. The interests of the tenants, the Government and the facilities use contractors need to be fairly addressed and reconciled.

May I also respectfully draw the Councils' attention to the Congressional declaration of national policy found at 10 USC 4552(9), which states that it is the "policy of the United States of America . . . to encourage facilities use contracting where feasible." It is hard to see how the elimination of facilities use contracting could possibly further this Congressionally declared national purpose.

Respectfully submitted,

Gregory S. Hill

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Attorney at Law

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2004-025-30

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11/18/2005 10:26 AM

To "'farcase.2004-025@gsa.gov'" <farcase.2004-025@gsa.gov>
cc
bcc
Subject Comments on FAR Case 2004-025

Regarding FAR Case 2004-025:

The proposed FAR Part 45 rewrite is of great interest and some concern at Aeronautical Systems Center (ASC). The biggest concern identified by myself and the various individuals who submitted comments to me is the proposed elimination of the Special Tooling (ST) clause and the Special Test Equipment (STE) clause.

Air Force Regulation 78-3, Special Tooling Management Program, 10 May 1989, was implemented after the fiasco with the shutdown of the B-1 production line, and the resulting situation with ST and STE suddenly dumped on the Air Force to dispose of, with no disposition planning. The cover memo implementing AFR 78-3, signed by Ira Kemp, stated "Management of special tooling has been criticized over the years for poor management during weapon system production and untimely and uninformed decisions about disposition and post-production use. The regulation and the Special Tooling clause are intended to assist in improved management of special tooling acquired during weapon system development and production".

Some individuals apparently believe ST and STE would be adequately covered by the baseline GFP requirements. Industry perceives the management of ST and STE as required by the clauses to be an administrative burden. But if the ST clause goes away, the issue becomes how would we obtain the retention codes, and how would we decide which tools will be needed for post-production requirements. The retention code requirements are in the ST clause. Without the ST clause how would the government take possession of the tools fabricated on a fixed-price contract that are needed for spares, repair, or modification efforts? The tooling is not a deliverable under the contract and is not the end item. The existing ST clause says the contractor has to request disposition instructions from the Contracting Officer at which time the government can state its intention to exercise right-to-title. If the proposed text in 52.245-1(e) is intended to cover right-to-title of ST, it does not mention ST, and ST is not included in the definitions in the proposed clause.

Also considered for elimination is the existing 52.245-2, which says all government owned tooling is subject to the terms of the tooling clause and not the general property clause. If the ST clause is eliminated and 52.245-2 is eliminated, ST essentially becomes indistinguishable from other government property.

Complicating matters for the Air Force is the fact the Air Force has mandated the use of the Air Force Equipment Management System (AFEMS) for managing and tracking all government owned tooling, which allows the Air Force to comply with CFO reporting requirements. That database requires extensive information on the tooling which is only available from the contractor, most of which is a records requirement in the ST clause.

If the STE clause is eliminated, all the controls in place via the clause also will disappear. We interpret the reason for the STE clause is to enable the government to determine whether there is sufficient justification to allow the purchase of equipment to be classified as STE. With the STE clause in place the STE is government owned regardless of contract type being fixed-price or cost-reimbursement. If the clause is eliminated, and what used to be classified as STE is purchased under a fixed-price contract, and the property is needed for a follow-on contract, how would the government take possession unless the property was a deliverable? Again, is the proposed 52.245-1(e) intended to cover STE?

We question how effective it will be for contractors deciding how often to periodically inventory GFP, and

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how to conduct the inventories. We also question how the lack of government oversight will prevent misuse of GFP, or commercial use without compensation to the government.

The proposed 45.501 "Support Government property administration" paragraph (a) is of concern. If we own property, why should the property administrator be limited to requesting support administration to when the prime contractor agrees to it. Then, there appears to be a missing step after paragraph (c). After the prime property administrator refers the matter to the Contracting Officer, then what? No further Contracting Officer action is called for.

In the proposed clause 52.245-1, paragraph (f) (v) (B), "The contractor shall assure its subcontracts are properly administered and reviews are periodically performed to determine the adequacy of the subcontractor's property management system." This is vague. It begs the question of who is responsible for accomplishing the reviews and providing the determinations.

Daniel R. Fleischman
Procurement Analyst
ASC/PKAA, WPAFB Ohio

INSPECTOR GENERAL
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2004-025-31

NOV 18 2005

Ms. Laurieann Duarte
General Services Administration
FAR Secretariat (MVA)
1800 F Street, NW, Room 4035
Washington, DC, 20405

Dear Ms. Duarte:

We reviewed the proposed Federal Acquisition Regulation (FAR) Case No. 2004-025, "Government Property," that simplifies procedures, clarifies language, and eliminates obsolete requirements related to the management and disposition of Government property in the possession of contractors. We generally agree with the proposed changes; however, the proposed revision has eliminated any requirement for a contractor to report annually the total acquisition cost of Government property that they are accountable for. The requirement for an annual report is essential. Government agencies have a continued need to collect and report the value of Government property associated with existing contracts as part of their financial statements and the associated audits. An annual report would also help protect the Government interest in public property. Therefore, FAR Part 45 should require contractors to submit an annual report.

Thank you for the opportunity to comment on the proposed rule. If you have any questions, please contact Ms. Patricia Bartron at (703) 604-8753.

Patricia A. Brannin
Assistant Inspector General
for Audit Policy and Oversight

cc: DAR Council
DIG-I&P (e-mail)

2004-025-32

DEFENSE CONTRACT MANAGEMENT AGENCY
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IN REPLY
REFER TO DCMA-OCB

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800 F Street, NW, Room 4035
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Washington, DC 20405

Ms. Duarte

DCMA is pleased to have the opportunity to comment on the proposed FAR rule. I respectfully submit the following comments on behalf of DCMA.

Proposed FAR Part 45 provisions Affecting Government Title Interests

1. It has come to our attention that the proposed FAR Part 45 proposes to alter the existing provisions governing the respective ownership rights of the Government and its contractors in contract materials paid for with Government funds in various contexts. The major change would be to vest title in the Government only to property acquired by the contractor and charged as an item of direct cost. We do not believe this proposed change is consistent with Government interests or compliant with statutory law. We urge you to either (a) leave the existing provisions governing title unchanged, or (b) consider clarifying changes consistent with this legal opinion instead of those now proposed.

2. At the outset, we note that both the existing and the proposed language of Part 45 state in the first section, 45.000, Scope of Part, that Part 45 "does not apply . . . to property to which the Government has acquired a lien or title solely because of partial, advance, progress, or performance-based payments," yet as now proposed, the text goes on to do so. The "scope" statement makes sense; we suggest that coverage of this subject matter is not most reasonably addressed by Part 45. Aside from existing Property clauses, ownership interests in property under contracts are separately governed by at least the contract clauses governing Advance Payments, Progress Payments, Installment Payments, Performance based Payments, Incremental Payment (for construction contracts), Responsibility for Supplies, and Terminations. These other clauses were constructed to protect the Government's financial investment in contract materials. The proposed language appears to be directed at limiting the scope of materials that must be subjected to relatively onerous property system controls. These are separate concerns and should be addressed separately. Practically speaking, the coverage could be contained in any of a number of places in the FAR, but we suggest that it will be far more difficult to cover it consistently in Part 45 and also in the various payment and financing provisions than to choose one option or the other. (In this regard we note that there is now clear coverage of the transfer of title in Part 32 clauses for traditional contract financing, but the comparable coverage for interim cost reimbursements under cost-type contracts is in the applicable Government Property clause, 52.245-5. We suggest that ideally the coverage of title in this clause should be moved to 52.216-7, Allowable Cost and Payment, but realize

that this is not within the scope of your committee. Simply leaving the existing provisions in the Government Property clause unchanged would be a reasonable option.)

3. The Government has consistently taken the position in litigation that title to property obtained by contractors passes to the Government upon Government reimbursement of the costs, to the extent that the materials (a) are incorporated into a deliverable end item or (b) are consumed in producing the end item. (See, for example, the attached affidavits, presented as evidence in two separate litigation cases after full coordination at OSD.) In simple commercial terms, these materials are deemed to have been bought for immediate transfer to the Government. We have never seen any reason to distinguish, for these purposes, between materials purchased under a contractor accounting system that accounts for them as overhead materials and one that accounts for them as direct-cost items. We note that one industry commentator (Richard C. Johnson, of the law firm of Smith Pachter McWhorter & Allen, PLC) has already submitted a discussion of how this issue has been relevant in a series of State and Federal District court cases involving liability of contractors for state sales and use taxes, when materials are purchased "for resale" in state tax law terms, regardless of whether they are reimbursed through indirect
or direct cost allocation. We fully agree with this commentator's analysis of this issue, and do not see any rationale for the Government to gratuitously give up the protection of the noted state tax laws. (We are not commenting on the other issue he addresses.) However, tax litigation is not the basis for our legal concern. The issue is that the analysis used in those tax cases was correct, not that it resulted in cost savings to the Government. State tax law in each case noted by the commentator resulted in exemption from the state tax because title did in fact pass to the Government under our contract terms. If the states
concerned chose to modify their tax laws to eliminate this exemption, it would still be true that the Government is entitled to and should continue to assert title to the covered goods.

4. Whenever the Government creates a provision for making payment under a contract without receiving delivered items in return, it must consider the application of 31 U.S.C. §3324, "Advances." That statute provides in part:

> (a) Except as provided in this section, a payment under a contract to provide a service or deliver an article for the United States Government may not be more than the value of the service already provided or the article already delivered. The intent of this provision is that the United States should not pay for any work or materials until it has received the benefit. 20 Op. Atty. Gen. 746 (1894); 18 Op. Atty. Gen. 105 (1885). The Comptroller General has held that the statute was not intended to prevent a partial payment in any case in which the amount of such payment had actually been earned by the contractor, "and the United States had received an equivalent therefore." 1 Comp. Gen. 143 (1921). When title passes, "the condition that the United States must receive a corresponding benefit in order to justify the making of a partial payment is . . . fulfilled." (*Id.*) Under the "corresponding benefit" theory, the corresponding benefit delivered to the Government comes in the form of title or an enforceable lien (a property interest) in favor of the United States, in an amount at least equal to the payment. 28 Comp. Gen. 468 (1949); 20 Comp.Gen. 917 (1921). This theory later formed the basis of contract financing statutes discussed below.

5. The language quoted above begins "except as provided in this section," but the specific exceptions provided there are extremely narrow and do not help here. The only relevant exception is paragraph (b)(1), as follows:

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(b) An advance of public money may be made only if it is authorized by — (1) a specific appropriation or other law.

But the only "other law" that comes into play is 10 U.S.C. §2307, "Contract financing" (applicable to DoD contracts only). It is clear from case law that the term "advances" as used here includes all payments before delivery of goods or services. This is a broader term than, for instance, "advance payments" as used in the FAR. Partial payments, progress payments, and installment payments are all generically "advances." Such payments are illegal under Government contracts except to the extent that they are authorized by the "other law," 10 USC §2307. That section provides:

(a) Payment Authority. - The head of any agency may –

(1) make advance, partial, progress, or other payments under contracts for property or services made by the agency

* * *

(d) Security for Advance Payments. - Advance payments made under subsection (a) may be made only if the contractor gives adequate security and after a determination by the head of the agency that to do so would be in the public interest. Such security may be in the form of a lien in favor of the United States on the property contracted for, on the balance in an account in which such payments are deposited, and on such of the property acquired for performance of the contract as the parties may agree. This lien is paramount to any other liens and is effective immediately upon the first advancement of funds without filing, notice, or any other action by the United States.

(e) Conditions for Progress Payments. -

(1) The Secretary of Defense shall ensure that any payment for work in progress (including materials, labor, and other items) under a defense contract that provides for such payments is commensurate with the work accomplished that meets standards established under the contract. The contractor shall provide such information and evidence as the Secretary of Defense determines necessary to permit the Secretary to carry out the preceding sentence.

(2) The Secretary shall ensure that progress payments referred to in paragraph (1) are not made for more than 80 percent of the work accomplished under a defense contract so long as the Secretary has not made the contractual terms, specifications, and price definite.

* * *

(h) Vesting of Title in the United States. - If a contract paid by a method authorized under subsection (a)(1) provides for title to property to vest in the United States,

the title to the property shall vest in accordance with the terms of the contract, regardless of any security interest in the property that is asserted before or after

the contract is entered into. The authority granted in the above statute is limited authority, not plenary. That is, if not for the explicit authorization granted by section 2307 to make "advance, partial, progress, or other payments under contracts," any such

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payments would be prohibited by 31 U.S.C. §3324. That being so, such payments must be made on the basis of "security," including, where applicable, title to the affected contract materials.

6. There has been some confusion in past years regarding Government contract provisions which state that title passes to the United States, but any such confusion was laid to rest by the enactment of what is now paragraph (h) quoted above. In short, "title" in a contract means "title." If the United States Government provides funding to a contractor pursuant to a contract term which says title passes (such as the Progress Payments clause), title must pass or the contract funding payment is not "authorized by law." This is not to say that a standard FAR clause *could not* provide for payments without passage of title; but such payments would still constitute "advances" within the meaning of the statute. Therefore, if not title, some other form of security for the payments would be required by 10 USC §2307(d).

7. Of course interim cost reimbursement vouchers are, like progress payments, financing payments. This is recognized in the Allowable Cost and Payment clause, FAR 52.216-7, paragraph (a)(2). They are payments made on the basis of costs incurred, in advance of contract "delivery." Unlike progress payments, the contractor's entitlement to them is not wholly conditioned on satisfactory performance, in the event of termination, but the contractor must deliver all materials produced at that time, as an offset to the costs. The proposed provisions on title would draw a strange and arbitrary line in that we would continue to assert title to materials paid for with progress payments and interim cost voucher payments. Our interest in progress payments would be protected in two ways – first, because we would unequivocally own title to all progress payment inventory, and second, because the contractor would have no right to retain any progress payments if it fails to deliver conforming end items; yet neither protection would hold true for financing paid by interim cost voucher.

8. The requirements of 10 USC §2307 may be viewed as a special set of circumstances within the scope of 31 USC §3324(a), or alternatively as an exception "authorized by . . . other law." The result is the same for present purposes. When title to work in process is transferred to the Government, in effect there is no "payment [of] more than the value of the service already provided or the article already delivered." The word "delivered" here does not incorporate the various delivery terms of contracts; for instance, it does not depend on whether delivery is f.o.b. origin or destination. What is "delivered" in the case of all authorized contract financing is something of value, whether it be title, a lien, or substituted security in (for instance) a bond or a bank account. For instance, under the Progress Payments clause, the unliquidated progress payments may not exceed the value of the incomplete work – which is "delivered" in the sense that the Government has received title. (This grows out of the "corresponding benefit" theory discussed above.) Whether 10 USC §2307 is viewed as a statutory exception to, or a narrow application of,

31 USC §3324(a), it is clear that existing law – including FAR provisions to date – has never authorized payments out of contract funds for *unsecured* advances. The effect of the proposed change is to do exactly that for the first time. We do not believe this is permitted under the statutory law.

9. The practical effect is substantial, in regard to protection of the Government's financial interests. It has often been necessary to enforce existing title-vesting clauses strictly. For instance, when a contractor goes bankrupt after receiving progress payments, the Government notifies the debtor-in possession or bankruptcy trustee that all "progress payment inventory" must be held for the Government and not included in the bankruptcy estate. When a contractor simply closes its doors without filing for bankruptcy, this agency has had to request the U.S. Marshall's Service to seize the Government property.

When a contractor uses Government property – which has been defined as such by virtue of (for instance) progress payments or other cost reimbursement terms – without permission, the Government demands rent and/or surrender of the property; on occasion such misuse has been the basis of criminal or civil fraud charges. Criminal charges have also been filed when a contractor obtains Government financing on the basis of false statements that it has obtained clear title to goods as a prerequisite to such financing. Title may also be an important protection when a contract must be terminated for convenience or default and the contractor is unwilling to cooperate with settlement and plant clearance procedures.

10. The proposed change draws an artificial distinction between materials charged as direct cost items and those charged as indirect. This is not a meaningful distinction. The charging practice may vary from contractor to contractor on the basis of the size of the business, how much of a given kind of material it consumes in its production, and the sophistication of its accounting systems. One contractor may charge hardened steel bolts as direct while another charges all structural steel parts as well as fasteners as indirect. A distinction between direct and indirect charging does not particularly reflect the value of the material, either in absolute terms or relative to the value of the end item, the risk of loss, or any other factor relevant to the Government's financial interests. We see no logical reason that the Government's ability to secure its financial interests in the payments it makes should depend on the contractor's cost accounting decisions.

11. Precisely when title passes is spelled out in the existing clause. The choice of timing is not inflexible; however, the goal is to ensure that at any given time, the amount of costs that may be reimbursed will not exceed the value of the title to goods that has been passed to the Government. The current system is one reasonable way of minimizing the risk.

12. Please note a few implications that this analysis does not have for the proposed regulation.

a. It is not necessary that title, once vested in the Government, remain there. Title to any remaining progress payment inventory is relinquished when the contractor delivers end items of value at least equal to the outstanding payments. There is no need for security or other equivalent once the contractor has delivered the end items at the final agreed price. We do not view this relinquishment of title as raising any concern in regard

to disposition of Government property, since the only purpose for which the Government required title to items in excess of the deliverables was as temporary security.

b. We express no opinion on whether property system controls should be extended to contractor acquired goods, whether reimbursed as direct or indirect costs. Legal protection of the Government's interest does not clearly require annual inventory, physical

security, tagging, and the like. How much risk the Government is willing to accept that its property might disappear or be damaged is a business judgment. Imposition of relatively burdensome controls on the property is legally supportable if desired, but by no means legally mandated.

c. Our reasoning does not imply that title must be claimed in all physical objects that contribute to indirect costs, including (for instance) office equipment and supplies. Our primary past position has been that title passes to the Government in supplies that are wholly consumed in the production process and/or incorporated into the end items. The reason for this is that there is a sound general presumption that the value of such materials is incorporated into the work in progress only in proportion to the consumption of the goods. This presumption may be untrue in some circumstances, but normally can reasonably be relied on in determining that the amount of payments made is "secured" by the value of work in process. Other indirect costs, whether

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represented by labor or by pure overhead items such as office supplies, tend to convey their value to the end item by virtue of their use, regardless of the lack of physical incorporation. However, it is clear that the entire value of (for instance) an office photocopy machine is never transferred to the deliverable end item, unless in some unusual case in which it is used for nothing else and its entire useful life is expended on that end item. As to such "administrative" overhead materials, we believe that statutory law requires that we acquire a property interest, but it may be an imprecise or not fully defined property interest in the contractor's equipment as a whole, not specific items. If, for instance, the contractor abandoned all Government work and filed for bankruptcy, we would have a valid legal interest in property to present to the trustee, but in a class of items rather than specific items. d. The above is not intended to call for any change in the provisions for risk of loss to materials. As to contractor-acquired (direct or indirect) materials, the major issue is whether the cost of replacing the item will be an allowable contact cost; there is generally no issue of liability for replacement of general contractor-acquired property in the same sense as there is for Government-furnished property or STE. You may want to consider addressing this issue but we do not see that the result is mandated by law.

13. In summary, we believe that the proposed change to section 45.401 is misconceived and, to the extent that it waives any Government property interest in materials paid for on the sole basis that they are paid as indirect costs, contrary to law. We see no reason to distinguish, for these purposes, materials whose costs are allocated to contracts through indirect pools from those that are charged directly. The proposed provision waives a Government interest that is both mandatory and of great practical value. We suggest that sections 45.401(b) and (c) should be either removed, or modified to state clearly that title passes to the Government in all materials that (a) are either incorporated in or consumed in producing the contract goods, and (b) are relied on as a basis for any Government payment before delivery of the deliverable end items. We also recommend a corresponding correction to the proposed Government Property clause, paragraph (e), at least by removing the word "direct"; reverting entirely to the existing language might be a better solution.

14. To avoid confusion, we strongly urge that some comment consistent with the above be made in the Federal Register notice responding to public comments on this proposed section. In view of the comments already received, simple withdrawal of the questioned provisions will give the incorrect impression that the Agency's or the Committee's position is based on a desire to protect our interests in tax litigation. We believe it should be made

clear that the Committee believes that already existing law and sound fiscal policy both support a Government claim of title as described above, not simply that we prefer to do so as a matter of strategy. We will be glad to assist in formulating or editing such comments.

STEVEN GRUENWALD
for the Contract Law Group Steering Committee

JEAN MARIE FARIS
Legal Advisor
DAR Government Property / Plant Clearance Committee

2004-025-33

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November 18, 2005

General Services Administration
Regulatory Secretariat (VIR)
1800 F Street, NW
Room 4035
Attn: Laurieann Duarte
Washington, DC 20405

Ref: FAR Case 2004-025 (Government Property)
CODSIA Case No. 05-06

By email: farcase.2004-025@gsa.gov

Dear Ms Duarte:

We the undersigned members of the Council of Defense and Space Industry Associations (CODSIA) appreciate the opportunity to provide comments on the proposed rule on Government Property (FAR Case 2004-025), published in the *Federal Register* on September 19, 2005.

Founded in 1964 by industry associations with common interests in defense and space fields, CODSIA is currently comprised of six associations representing over 4,000 member companies across the nation. Participation in CODSIA projects is strictly voluntary. A decision by any member association to abstain from participating in a particular activity is not necessarily an indication of dissent.

For over ten years the associations have participated in numerous meetings, proposed revisions, and dialog with the government on the need to improve and streamline the control of government property in the possession of contractors. We have long been frustrated by the inability to reach a consensus that would benefit the taxpayers through greater economy and efficiency in the management of government property. For the first time we believe that the mutual goal is at hand.

The proposed rule changes radically the overall approach to managing government property. For the first time the rule recognizes that contractors for many years have been managing inventories of their own property—very successfully. By accepting commercial practices and standards, the proposed rule adopts voluntary consensus standards as the principal criterion for an acceptable contractor government property management system. Instead of

prescriptive-type requirements, the contractor is offered an opportunity to manage government property with principle-based standards in much the same manner as his own—obviating a need for a separate and costly government dictated system.

For this we are very appreciative to the project officer and the many people within the agencies who have labored for years in search of a mutually beneficial solution. We believe, overall, the proposed rule presents a successful outcome for both government and industry in this long-term endeavor.

Principal Concerns

While we are in general support of the overall tenor of this comprehensive proposed rule, we do, however, have three principal concerns and other significant concerns. All of our comments are presented in the line-in/line-out matrix document included with this letter as Attachment B, with those significant issues so annotated. Our principal concerns are more fully addressed below and center on the following areas: (1) access to a contractor's internal reviews of its property systems; (2) revision of the title provisions; and (3) furnishing government property "As Is."

Access to Contractor Internal Audit and Review Records.– Proposed FAR 52.245-1(f)(3) provides: "The Contractor shall establish and maintain procedures necessary to assess its property management system effectiveness, and shall perform periodic internal reviews and audits. The findings and/or results of such reviews and audits shall be made available to the Property Administrator." In addition, FAR 52.245-1(g)(1) provides access to the contractor's property management systems, procedures, records and supporting documentation. Taken together, we interpret these two clauses to add a new requirement for internal audits and reviews and the mandatory furnishing of the documentation of these internal audits and reviews to the government, thus, inappropriately expanding government access to internal company audits. In addition these clauses can be read to require access to a contractor's entire property management system, including records and internal audit reports on the contractor's own inventory, commercial property and other property. Such an expansive access to records is likely unintended and is certainly unnecessary and inappropriate. We strongly recommend these requirements be revised as recommended in our comments provided in **Attachment B.**

Revision of the Title Provisions.--Over the years courts have held that overhead property is owned by the United States government and immune from state taxation. In fixed price type contracts, the Progress Payments clause FAR 52.232-16 provides that the government shall obtain title to contractor's property financed by progress payments. In cost type contracts, title to overhead materials passes to the government under FAR 52.245-(c)(3). FAR 31.2 requires allocation of cost in accordance with the Cost Accounting Standards which, among other things, requires consistency in the cost accounting practices of government contractors and subcontractors. Indirect costs are allocated to all of the contractor's contracts based on rates established on forecasted or actual/standard costs. These allocated indirect costs are subsequently billed and reimbursed by the government in accordance with the Allowable Costs and Payment clause at FAR 52.216-7. The courts have found the necessary linkage to government title in both cost and fixed price contracts through these clauses. However the

proposed rule does serious damage to these established links—potentially eliminating any argument for exempting overhead costs—thus jeopardizing the necessary ownership provisions needed to protect the status of these indirect costs as government property. Moreover, the proposed rule could result in significant increased costs to the government. We strongly recommend that the established title provisions be retained as they are worded today in the existing clause—excluding references to deleted clauses.

Furnishing Government Property "As Is".--Proposed FAR Part 52.245 (d)(iii) states that, "The Government may, at its option, furnish property in an ''as is'' condition. In such cases, the Government makes no warranty with respect to the serviceability and/or suitability of the property for contract performance. Any repairs, replacement, and/or refurbishment shall be at the Contractor's expense." The current "as is" clause (FAR Part 52.245-19) is limited to fixed priced contracts and must be disclosed in a solicitation. This new provision creates an extraordinary cost risk for contractors, particularly small and medium-size contractors, that may not have the resources to absorb the cost of making an unknown quantity of property suitable for use. It is unfair to permit the government, without prior contractor agreement, to deliver property that is not suitable for its intended use and avoid assumption of any responsibility for the cost of its repair and restoration. We strongly recommend this provision be deleted; in the alternative, any new "as is" provisions in this clause must reflect the same characteristics as in the current clause language.

The preamble of the proposed rule asks several specific questions. Our responses to the questions are provided in **Attachment A.** Our detailed comments on the rule, with comments and suggested textual revisions, are contained in **Attachment B.** This letter and Attachments A and B comprise our comments provided on this rule.

We also note that the transition from the present FAR method of managing government property to operations under the new rule will take time and considerable effort. We should strive, however, to minimize the time period that entities are required to operate under multiple systems. Adequate preparation for implementation should be considered in the establishment of an effective date of the new rule. Both government and industry personnel will need extensive training before and during the implementation phase. We strongly recommend that a joint government/industry training program be sponsored by the Government to ensure that both parties have the opportunity to discuss and learn together about the changes that they will have to make. We stand ready to provide expert personnel who are thoroughly familiar with the effect of the new policies on industry to work with their government counterparts in developing and presenting such a program.

Again, we wish to thank all of those who over the years have devoted much time and many resources to the achievement of a workable and economic solution to a major government and industry problem. We do hope that satisfactory resolution of our issues will speed the finalization of this very important task. A strong and workable framework has been established by the proposed rule and we believe that with modification it can proceed to completion with our strong support.

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Thank you for your attention to our comments. If you have any questions or need any additional information, please contact the CODSIA project officer, Ms. Elaine Guth, at 703-358-1045 or elaine.guth@aia-aerospace.org.

Sincerely,

Robert T .Marlow
Vice President, Procurement & Finance
Aerospace Industries Association

Alan Chvotkin
Senior Vice President & Counsel
Professional Services Council

Dan Heinemeier
President
GEIA
Electronic Industry Alliance

Peter Steffes
Vice President, Government Policy
National Defense Industrial Association

Chris Jahn
President
Contract Services Association

Cynthia Brown
President
American Shipbuilders Association

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Attachment A

CODSIA Comments on Specific Questions
(FAR Case 2004-025, Government Property)
(CODSIA Case 05-06)

The Councils have requested specific comments on several parts of the proposed rule. These are addressed below:

Question 1: Whether the proposed wording of paragraphs FAR 52.245-1 (f) and (g) are clear in their intent; and whether the intent of paragraphs (f) and (g) could be achieved in some other manner.

Paragraph 52.245-1(f)

Part 45.103 (a) (1) prescribes that Agencies shall "Allow and encourage contractors to use voluntary consensus standards - - - and/or industry leading practices and standards to manage Government property in their possession."

Part 45.201(c) (3) requires the prospective offeror to submit "the voluntary consensus standard or industry leading practices and standards to be used in the management of Government property, or existing property management plans, methods, practices, or procedures for accounting for property."

Part 45.105 "Analysis of contractors' property management system" includes at (a) "The agency responsible for contract administration shall conduct an analysis of the contractor's property management policies, procedures, practices and systems."

CODSIA comment: This part and 45.201(c) (3) need to be made consistent in their requirements and terminology.

Paragraph (f) "Contractor plans and systems" establishes criteria for contractor plans and systems. Specifying at (f)(1) "contractors shall develop property management plans and systems - - - to enable the following outcomes:"

CODSIA Comment: Presumably, if all of these "outcomes" were incorporated in these plans and systems, the contractor would have adequate property control as required by 45.104(b). While couched in the term of outcomes, these are actually prescriptive criteria with which" the Contractor "shall" comply. For example, the requirements for property records require ten specific elements of data to be included in every property record unless otherwise approved by the Property Administrator.

Notwithstanding the admonition for agencies to allow and encourage contractors to use voluntary consensus standards and/or industry leading practices and standards to manage Government property in their possession (45.103), this paragraph (f) enumerates in checklist form the criteria with which the contractor must comply. Please note that these

are not "practices" as prescribed in 45.104 (b), or 45.252 (g) (3), the yardstick by which a contractor's management of Government property is to be judged.

While paragraph (f) is clear in its intent, it is inconsistent with other parts of the proposed rule. We recommend that the prescriptive language be removed.

Paragraph (g)

Paragraph (g) (3) provides that "Should it be determined by the Government that the Contractor's property management *practices* are inadequate or not acceptable for the effective management and/or control of Government property _ - - and/or present an undue risk to the Government, the contractor shall take all necessary corrective action - - - ". (Emphasis added.)

CODSIA Comment: This is consistent with 45.105 (b) in its citation of contractor practices as the sole criterion for finding a contractor's management of government property inadequate or not acceptable. However, the term "practices" is not defined within the rule. Commonly regarded as being the actual performance or application of what has been advocated in principle, practices here appear to reflect the performance of managing government property.

While this new approach to the protection of government property has a common sense appeal, it is fraught with risk for both government and industry. A contractor's property management plans and systems are visible, tangible entities, subject to scrutiny by various observers. A plan or system can be objectively analyzed and evaluated. Reasonable people may agree or disagree over the content of the plan or system but these conclusions are based on factual details, not speculative or emotional considerations.

The evaluation of a complex management system, involving possibly hundreds of individuals, in multiple corporate organizations and locations must be objective. The determination of the adequacy or inadequacy of a contractor's system must be able to stand the scrutiny of independent review by third parties. Perceptions of inadequacy based on one or more individual's personal views of compliance are too subjective for this important task. Failure to ensure objectivity will certainly result in costly and disruptive litigation.

To this end, it is recommended that the basis for evaluation be the contractor's property management plans and systems. These should conform to voluntary consensus standards and/or industry leading practices and standards. Failure by contractor personnel to comply with these tangible requirements can be dealt with individually based on the circumstances. The question should be whether they complied with the stated plan or system description, not whether the manner or way in which they performed their task was considered to be adequate or inadequate by the Property Administrator.

Question 2: Facilities Contracts

The Councils requested comments on the instances in which there is a continued need for coverage with regard to facilities type contracts.

CODSIA Comment: The proposed elimination of coverage of facilities type contracts should not result in any significant problems. Use of properly drafted service contracts should suffice.

Question 3: Special Tooling Clause

The Councils solicited comments on the deletion of 52.245-17, Special Tooling.

CODSIA Comment: We recommend that this clause be deleted. As industry has previously commented, the clause serves no useful purpose under the current proposed revision to the regulation.

	FEDERAL REGISTER	SUGGESTED CHANGE	COMMENT
Line #		CODSIA Proposed Revisions; Significant Issues Noted with Asterisk Next to Line Item Number	Attachment B (FAR Case 2004-025; CODSIA Case 05-06) Detailed Comments
	Comments Submitted by:		
	Name: Council of Defense and Space Industry Associations		Proposed revisions and comments are offered in the spirit of clarifying and improving the proposed rule.
	Point of Contact: Elaine Guth		
	Phone: 703-358-1045		
	E-mail: elaine.guth@aia-aerospace.org		
1	PART 1—FEDERAL ACQUISITION REGULATIONS SYSTEM 1.106 [Amended] 2. Amend section 1.106 in the table following the introductory paragraph by removing FAR segments "52.245–3", "52.245–5", "52.245–7", "52.245–8", "52.245–10", "52.245–11", "52.245–16", "52.245–17", and "52.245–18" and the corresponding OMB Control Number "9000–0075".		
2	**PART 2—DEFINITIONS OF WORDS AND TERMS** 3. Amend section 2.101 in paragraph (b) by revising the definition "Plant clearance officer", and by adding, in alphabetical order, the definitions "Special test equipment", "Special tooling", and "Voluntary Consensus Standards" to read as follows:		
3	**2.101 Definitions.**		

	FEDERAL REGISTER	SUGGESTED CHANGE	COMMENT
	* * * * * (b) * * * *Plant clearance officer* means an authorized representative of the contracting officer assigned the responsibility of screening, redistributing, and disposing of Contractor Inventory from a Contractor's plant or work site. The term "Contractor's plant" includes, but is not limited to, Government-owned Contractor-operated plants and Federal installations as may be required under the scope of the contract. * * * * *	.... redistributing, and disposing of *Contract~~or~~ Property ~~Inventory~~* from…	See 45.1, term "Contractor Inventory" -- If change in term is not acceptable then a new term is required. Definition of Plant Clearance Officer should be left as is ". . . to disposition property accountable under Government contracts." Boundaries appear to have changed based upon location rather than contract – this may have not been the intent. Prefer either contract or proximity to property, what ever is most advantageous to the contracting parties.
4	*Special test equipment* means either single or multipurpose integrated test units engineered, designed, fabricated, or modified to accomplish special purpose testing in performing a contract. It consists of items or assemblies of equipment including standard or general purpose items or components that are interconnected and interdependent so as to become a new functional entity for special testing purposes. Special test equipment does not include material, special tooling, real property (except foundations and similar improvements necessary for installing special test equipment), and equipment items used for general testing purposes or property that with relatively minor expense can be made suitable for general purpose use.	Special test ***equipment is a subset of "equipment" and*** means either…..	Tie in with definition of "Equipment".

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	FEDERAL REGISTER	SUGGESTED CHANGE	COMMENT
5	*Special tooling* means jigs, dies, fixtures, molds, patterns, taps, gauges, all components of these items, and replacement of these items, which are of such a specialized nature that without substantial modification or alteration their use is limited to the development or production of particular supplies or parts thereof or to the performance of particular services. Special tooling does not include material, special test equipment, unique federal property, real property (except foundations and similar improvements necessary for installing special tooling), equipment, machine tools, or similar capital items. * * * * *	Special tooling *is a subset of "equipment".* means jigs, dies, fixtures, molds, patterns, taps, gauges, all components of these items, ~~*and replacement of these items,*~~ which are of	Tie in with definition of "Equipment". Upon replacement, the finite classification may change, e.g. special tooling to general purpose tooling.
6	*Voluntary Consensus Standards* means common and repeated use of rules, conditions, guidelines or characteristics for products, or related processes and production methods and related management systems. Voluntary Consensus Standards are developed or adopted by domestic and international voluntary consensus standard making bodies. * * * * *	Reference FAR 11.101(c)	The definition should be the same as provided in OMB Cir A119.
7	**PART 17—SPECIAL CONTRACTING METHODS** 4. Amend section 17.603 by revising paragraph (a)(5) to read as follows:		

	FEDERAL REGISTER	SUGGESTED CHANGE	COMMENT
	17.603 Limitations. (a) * * * (5) Functions that can more properly be accomplished in accordance with Subpart 45.3, Authorizing the Use and/or Rental of Government Property. * * * * *		
8	**PART 31—CONTRACT COST PRINICPLES AND PROCEDURES** 5. Amend section 31.205–19 by revising paragraph (e)(2)(iv) to read as follows: **31.205–19 Insurance and indemnification.** * * * * * (e) * * * (2) * * * (iv) Unless the Government has determined that the contractor's property management practices are inadequate and/or present an undue risk to the Government, costs of insurance for the risk of loss, damage, destruction, or theft of Government property are allowable to the extent that the contractor is liable for such loss, damage, destruction, or theft, and such insurance does not cover loss, damage, destruction, or theft which results from willful misconduct or lack of good faith on the part of any of the contractor's managerial personnel (as described in the FAR clause at 52.245– 1(h)(1)(ii)). * * * * *	…(iv) Unless the ~~*Government has determined*~~ *Contracting Officer has made a final determination* that the contractor's property management practices are inadequate and/or present ~~*an undue*~~ *a material risk*… …for the risk of loss, damage, *or* destruction, ~~*or theft*~~ of Government property are … contractor is liable for such loss, damage, *or* destruction~~, *or theft*,~~ and such insurance does not cover loss, damage, *or* destruction~~, *or theft*,~~ which…	Clarifies that it requires a determinative action by the Contracting Officer to take such drastic action. Contractor costs and performance are at risk unless the Government's decision is clearly substantiated. "Materiality" is defined in FAR Part 30.602 (48 CFR 9903.305) The use of "material risk" is a better choice of words. The word "loss" is still listed, and "theft" is just one specific type of "loss". The addition of the word "theft" here and in other parts of the re-write is redundant.

	FEDERAL REGISTER	SUGGESTED CHANGE	COMMENT
9	**31.205–40 [Amended]** 6. Amend section 31.205–40 in paragraph (a) by removing "45.101" and adding "2.101(b)" in its place.		
10	**PART 32—CONTRACT FINANCING** 7. Amend section 32.503–15 by revising paragraph (b)(1) to read as follows: **32.503–15 Application of Government title terms.** * * * * * (b) * * * (1) The clause at 52.245–1, Government Property. * * * * *		
11	PART 35—RESEARCH AND DEVELOPMENT CONTRACTING 35.014 [Removed and Reserved] 8. Remove and reserve section 35.014.		
12	PART 42—CONTRACT ADMINISTRATION AND AUDIT SERVICES		
13	42.302 [Amended] 9. Amend section 42.302 by removing and reserving paragraph (a)(27).		
14	PART 45—GOVERNMENT PROPERTY 10. Amend section 45.000 by revising the second sentence to read as follows:		

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15	45.000 Scope of part. * * * It does not apply to property under any statutory leasing authority, (except as to non-Government use of plant equipment under 45.301(f)); to property to which the Government has acquired a lien or title solely because of partial, advance, progress, or performance-based payments; or to disposal of real property.	45.000 Scope of part. * * * It does not apply to property under any statutory leasing authority, (except as to non-Government use of ~~plant~~ equipment under 45.301(f)); to property to which the Government has acquired a lien or title solely because of partial, advance, progress, or performance-based payments; or to disposal of real property.	The definition for plant equipment has been deleted and equipment has been substituted in most cases in the re-write. In new 45.301(f) the all inclusive term "Government property" is used, but should be "equipment" based on the context.
16	11. Revise Subparts 45.1 through 45.5 to read as follows:		
17	Subpart 45.1—General Sec. 45.101 Definitions. 45.102 Policy. 45.103 General. 45.104 Responsibility and liability for Government property. 45.105 Analysis of contractors' property management system. 45.106 Transferring accountability. 45.107 Contract clauses.		
18	Subpart 45.2—Solicitation and Evaluation Procedures 45.201 General.		
19	Subpart 45.3—Authorizing the Use and/or Rental of Government Property 45.301 Use and rental. 45.302 Contracts with foreign Governments or international		

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	organizations. 45.303 Use of Government property on independent research and development programs.		
20	Subpart 45.4—Title to Government Property 45.401 Title to Government property.		
21	Subpart 45.5—Support Government Property Administration 45.501 Support Government property administration.		
22	Subpart 45.1—General 45.101 Definitions. As used in this part—		
23	Acquisition cost means— (1) For contractor acquired property, the full cost determined in accordance with the system established by the Contractor in conformance with consistently applied sound accounting principles.	Acquisition cost means— (1) For contractor acquired property, the ~~full~~ cost determined in accordance with the system established by the Contractor in conformance with consistently applied sound accounting principles. *For equipment, referred to as unit acquisition cost.*	This term may be confusing to personnel unfamiliar with a contractor's accounting systems. Unit acquisition cost is consistent with the data elements. See also Line 104.
24	(2) For Government furnished property, the amount identified in the contract, or in the absence of such identification, the fair market value attributed to the item by the contractor.		

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	Common item means material that is common to the applicable Government contract and the contractor's other work. Contractor acquired property means property acquired, fabricated, or otherwise provided by the contractor for performing a contract and to which the Government has title.	~~***Common item means material that is common to the applicable Government contract and the contractor's other work.***~~ Contractor acquired property means…	Superfluous. Not used elsewhere. See also Line 106.
25	Contractor inventory means— (1) Any property acquired by and in the possession of a contractor or subcontractor under a contract for which title is vested in the Government and which exceeds the amounts needed to complete full performance under the entire contract;	***Contractor property inventory*** means— (1) Any property acquired by ***or*** ~~***and***~~ in the possession of a contractor or subcontractor under a contract for which title is vested in the Government ~~*and which exceeds the amounts needed to complete full performance under the entire contract;*~~	More accurately defines property under contracts. ***Note:*** This change in definition avoids a conflict with the Federal Property and Administrative Services Act of 1949 where "contractor inventory" is defined. See also Line 109.
26	(2) Any property that the Government is obligated or has the option to take over under any type of contract, e.g., as a result either of any changes in the specifications or plans thereunder or of the termination of the contract (or subcontract thereunder), before completion of the work, for the convenience or at the option of the Government; and	~~*(2) Any property that the Government is obligated or has the option to take over under any type of contract, e.g., as a result either of any changes in the specifications or plans thereunder or of*~~ ~~***the termination of the contract (or subcontract thereunder), before completion of the work, for the convenience or at the option of the Government; and***~~	This change in term and definition avoids the conflict with the term identified in the Federal Property and Administrative Services Act of 1949 and is more consistent with current and future practice.
27	(3) Government-furnished property that exceeds the amounts needed to	~~*(3) Government-furnished property that exceeds the amounts needed to*~~	This change in term and definition avoids the conflict with the term identified in the

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	complete full performance under the entire contract.	~~complete full performance under the entire contract.~~	Federal Property and Administrative Services Act of 1949 and is more consistent with current and future practice.
28	Contractor's managerial personnel means the contractor's directors, officers, managers, superintendents, or equivalent representatives who have supervision or direction of all or substantially all of the contractor's business; all or substantially all of the contractor's operation at any one plant or separate location; or a separate and complete major industrial operation.		
29	Demilitarization means rendering a product designated for demilitarization unusable for, and not restorable to, the purpose for which it was designed or is customarily used.	Demilitarization means rendering ***designated equipment or material*** ~~***a product designated for demilitarization***~~ unusable for, and not restorable to, the purpose for which it was designed or is customarily used.	Clarity - redundant phrase. See also Line 112.
30	Discrepancies incident to shipment means all deficiencies incident to shipment of Government property to or from a contractor's facility whereby differences exist between the property purported to have been shipped and property actually received.	Discrepancies incident to shipment means ~~***all deficiencies incident to shipment of Government property to or from a contractor's facility whereby differences exist***~~ *differences (e.g. count or condition)* between the property purported to have been shipped and property actually received.	Clarity See also Line 113.
31	Equipment means a tangible article of personal property that is complete in and- of itself, durable, nonexpendable, and needed for the performance of a contract. Equipment generally has an		

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	expected service life of one year or more, and does not ordinarily lose its identity or become a component part of another article when put into use.		
32	Government-furnished property means property in the possession of, or directly acquired by, the Government and subsequently furnished to the contractor for performance of a contract.	*Add "Is a subset of property in the possession of a contractor (PIPC)."*	Consistent with current UID requirements and terminology See also Line 115.
33	Government property means all property owned or leased by the Government. Government property includes both Government-furnished and contractor-acquired property.		
34	Material means property that may be consumed or expended during the performance of a contract, component parts of a higher assembly, or items that lose their individual identity through incorporation into an end-item. Material does not include equipment, special tooling, special test equipment, or unique federal property.	Material means property that may be consumed or expended during the performance of a contract, component parts of a higher assembly, or items that lose their individual identity through incorporation into an end-item. Material does not include equipment. ~~*, special tooling, special test equipment, or unique federal property.*~~	More in line with concept that tangible personal property is either material or equipment.
35	Nonseverable means property that cannot be removed after erection or installation without substantial loss of value or damage to the installed property or to the premises where installed.	Nonseverable means property that cannot be removed after ~~*erection*~~ *construction* or installation without substantial	Better word choice.
36	Precious metals means silver, gold,	Precious metals means silver, gold,	

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	platinum, palladium, iridium, osmium, rhodium, and ruthenium.	platinum, palladium, iridium, osmium, rhodium, and ruthenium.	
37	Property means all tangible property, both real and personal.		
38	Property Administrator means an authorized representative of the contracting officer assigned the responsibility of administering the contract requirements and obligations relating to Government property in the possession of a contractor.		
39	Provide means to furnish existing Government property or to allow the contractor to acquire property on behalf of the Government under this contract.	Provide *means either to furnish, as in Government-furnished property, or to acquire, as in contractor-acquired property.*	Consistent with DFARS 245.301 definition. See also Line 122.
40	Real property means land, land rights, buildings, structures, utility systems, steam-generation systems, and equipment attached to and made part of buildings and structures (such as heating systems). As such, land rights are considered real property. It does not include foundations and other work necessary for installing special tooling, special test equipment, or equipment.		Place this definition in FAR Part 2, as this is where "personal property" is defined.
41	Sensitive property means property potentially dangerous to the public safety or security if stolen, lost, or misplaced, or that shall be subject to exceptional physical security,		

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	FEDERAL REGISTER	SUGGESTED CHANGE	COMMENT
	protection, control, and accountability such as classified property, weapons, ammunition, explosives, controlled substances, radioactive materials, hazardous materials or wastes, or precious metals.		
42	Surplus property means excess personal property not required by any Federal agency as determined by the Administrator of the General Services Administration (GSA).	Surplus property means excess personal property not required by any Federal agency as determined by the Administrator of the General Services Administration (GSA) ***or as delegated.***	More realistic to current state.
43	Unique Federal property means Government-owned personal property that is peculiar to the mission of an agency, e.g., military or space property. Unique federal property excludes material, special test equipment, special tooling, real property and equipment.	Unique Federal property means Government-owned ***equipment*** ~~***personal property***~~ that is peculiar to the mission of an agency, e.g., military or space ***equipment*** ~~***property.***~~ Unique federal property excludes material, special test equipment, special tooling, and real property ~~***and equipment.***~~	Unique Federal property is a subset of equipment. Suggested change is consistent with the concept that personal property is either material or equipment.
44	45.102 Policy.		
45	45.102 Policy. (a) Contractors are ordinarily required to furnish all property necessary to perform Government contracts.		
46	(b) Contracting officers shall provide property to contractors only when it is clearly demonstrated— (1) To be in the Government's best interest;		

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	(2) That the overall benefit to the procurement significantly outweighs the increased cost of administration, including ultimate property disposal; (3) That providing the property does not substantially increase the Government's assumption of risk; and (4) That Government requirements cannot otherwise be met. (c) The contractor's inability or unwillingness to supply its own resources is not sufficient reason for the furnishing or acquisition of property.		
47	45.103 General.		
48	(a) Agencies shall— (1) Allow and encourage contractors to use voluntary consensus standards (see 11.101(c)) and/or industry-leading practices and standards to manage Government property in their possession.		
49	(2) Eliminate to the maximum practical extent any competitive advantage a prospective contractor may have by using Government property and ensure maximum practical reutilization of Contractor Inventory for Government purposes (see 45.602).	2) Eliminate to the maximum practical extent any competitive advantage a prospective contractor may have by using Government property and ensure maximum practical reutilization of Contract~~or~~ *property* ~~*Inventory*~~ for Government purposes (see 45.602).	Clarity. See Comment for 2.101 at Line 3.
50	(3) Require contractors to use Government property already in their possession to the maximum extent		

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	possible in performing Government contracts.		
51	(4) Charge appropriate rentals when the property is authorized for use on other than a rent-free basis.		
52	(5) Require contractors to justify retaining Government property not needed for contract performance and to declare property as excess when no longer needed for contract performance.		
53	(b) Agencies will not generally require contractors to establish property management systems that are separate from a contractor's established procedures, practices, and systems used to account for and manage contractor owned property.		
54	45.104 Responsibility and liability for Government property.		
55	(a) Generally, contractors are not held liable for loss, damage, destruction, or theft of Government property under the following types of contracts: (1) Cost reimbursement contracts. (2) Time and material contracts. (3) Labor hour contracts. (4) Negotiated fixed price contracts for which the price is not based upon an exception at 15.403–1.	damage, *or* destruction, ~~*or theft*~~ of Government property under the…	Consistent with prior comments

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56	(b) However, the contracting officer may revoke the Government's assumption of risk when the property administrator determines that the contractor's property management practices are inadequate and/or present an undue risk to the Government. A prime contractor that provides Government property to a subcontractor shall not be relieved of any responsibility to the Government that the prime contractor may have under the terms of the prime contract.	(b) However, the contracting officer may revoke the Government's assumption of risk when the property administrator determines that the contractor's property management practices are inadequate and/~~or~~ present *material* risks *an ~~undue~~*... to the Government. A prime contractor that provides Government property to a subcontractor shall not be relieved of any responsibility to the Government that the prime contractor may have under the terms of the prime contract.	The FAR addresses materiality and not "undue." Recommend the language align with FAR Part 30.602 (48 CFR 9903.305). See comment on Line 8. This is more consistent in adhering to best value concepts as provided in FAR Part 1.
57	45.105 Analysis of contractors' property management system.		
58	(a) The agency responsible for contract administration shall conduct an analysis of the contractor's property management policies, procedures, practices, and systems. This analysis shall be accomplished as frequently as conditions warrant, in accordance with agency procedures.		
59	(b) The property administrator shall notify the contractor in writing when the contractor's property management system does not comply with contractual requirements, (i.e., is inadequate, not acceptable and/or presents an undue risk to the Government), and shall request prompt correction of deficiencies and shall	(b) The property administrator shall notify the contractor in writing when the contractor's property management system does not comply with contractual requirements, (i.e., is inadequate, not acceptable and/or presents *a material* risk *~~an undue~~* to the Government), and shall request prompt correction of deficiencies and *require the contractor*	Clarification.

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	provide a schedule for their completion. If the contractor does not correct the deficiencies in accordance with the schedule, the contracting officer shall notify the contractor, in writing, that failure to take the required corrective action(s) may result in— (1) Contract price adjustment; (2) Withdrawal of the Government's assumption of risk for loss, damage, destruction, or theft; and/or (3) Other such action as determined by the contracting officer.	*to* provide a schedule for their completion. If the contractor does not correct the deficiencies in accordance with the schedule, the contracting officer shall notify the contractor, in writing, that failure to take the required corrective action(s) may result in— (1) Contract price adjustment; 2) Withdrawal of the Government's assumption of risk for loss, damage, *or* destruction~~, *or theft*~~ and/or (3) Other such action as determined by the contracting officer.	The contractor is in a better position to provide a schedule for corrections. The emphasis should be on a root cause corrective action plan rather than a quick fix.
60	(c) If the contractor fails to take the required corrective action(s) in response to the notification provided by the contracting officer in accordance with paragraph (b) of this section, the contracting officer shall notify the contractor in writing of any Government decision to apply the remedies described in paragraphs (b)(1) through (b)(3) of this section.		
61	45.106 Transferring accountability.		
62 *	Government property shall be transferred from one contract to another only when firm requirements exist under the gaining contract (see 45.102). Such transfers shall be documented by modifications to both gaining and losing contracts. Once transferred, all property	Government property shall be transferred from one contract to another only when firm requirements exist under the gaining contract (see 45.102). Such transfers shall be documented by modifications to *the* gaining and losing contracts *or another administrative*	Two trigger events are identified – Need to establish use of WAWF for transfers. Requiring formal modifications is incompatible with the FAR principle of minimizing administrative cost. There needs to be another administrative

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	shall be considered Government furnished property to the gaining contract.	*mechanism.* Once transferred, all property shall be considered Government furnished property to the gaining contract.	mechanism to accomplish this effort more efficiently that satisfies the desired outcome. Current practice only requires a contract modification to the gaining contract.
63	45.107 Contract clauses.		
64	(a)(1) Except as provided in paragraph (d) of this section, the contracting officer shall insert the clause at 52.245–1, Government Property, in— (i) All cost reimbursement, time-and-material, and labor hour type solicitations and contracts; and (ii) Fixed-price solicitations and contracts when the Government will provide Government property.		
65	(2) The contracting officer shall use the clause with its Alternate I in contracts other than those identified in 45.104(a).		
66	(3) The contracting officer shall use the clause with its Alternate II when a contract for the conduct of basic or applied research at nonprofit institutions of higher education or at nonprofit organizations whose primary purpose is the conduct of scientific research (see 35.014) is contemplated.		
67	(b) The contracting officer shall insert the clause at 52.245–2, Government		

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	Property (Installation Operations for Services), in service contracts to be performed on a Government installation when Government-furnished property will be provided for initial provisioning only and the Government is not responsible for repair or replacement.		
68	(c) The contracting officer shall insert the clause at 52.245–9, Use and Charges, in solicitations and contracts when rental of Government property is contemplated.		
69	(d) When the acquisition cost of the item to be repaired does not exceed the simplified acquisition threshold, purchase orders for property repair need not include a Government property clause.		
70	Subpart 45.2—Solicitation and Evaluation Procedures 45.201 General.		
71 *	(a) The contracting officer shall insert a listing of the Government property to be offered in all solicitations where Government-furnished property is anticipated (see 45.102). The listing shall include at a minimum— (1) The name, commercial part number and description, manufacturer, bulk identifier, model number, and National Stock Number (if needed for	(a) The contracting officer shall insert a listing of the Government property to be offered in all solicitations where Government-furnished property is anticipated (see 45.102). The listing shall include at a minimum— (1) The name, commercial part number and description, manufacturer, bulk identifier, model number, and National Stock Number (if needed for	The listing should include all material information to make an informed decision.

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	additional item identification tracking and/or disposition); (2) Quantity/unit of measure; (3) Unit acquisition cost; and (4) Unique-item identifier or equivalent (if available and necessary for individual item tracking).	additional item identification tracking and/or disposition); (2) Quantity/unit of measure; (3) Unit acquisition cost; and (4) Unique-item identifier or equivalent (if available and necessary for individual item tracking). *5) If provided "as is", supply condition code (for Fixed Price Competitive Contracts) and current location.*	Items provided "as is" must be identified in the solicitation for Fixed Price competitive contracts. Contractors must be provided all material information in order to bid in a responsible manner.
72 *	(b) When Government property is offered for use in a competitive acquisition, solicitations will ordinarily require that the contractor assume all costs related to making the property available for use, such as payment of all transportation, installation or rehabilitation costs.	(b) When Government property is offered for use in a *fixed price* competitive acquisition, solicitations ~~*will ordinarily may require the contractor to assume all shall prescribe the extent to which*~~ ***the contractor is to assume*** costs related to making the property available for use, such as payment of all transportation, installation or rehabilitation costs.	Predetermined contractual requirements may be counter to seeking best value.
73	(c) The solicitation shall describe the evaluation procedures to be followed, including rental charges or equivalents and other costs or savings to be evaluated, and shall require all offerors to submit the following information with their offers: (1) A list or description of all Government property that the offeror or its subcontractors propose to use on a rent-free basis. The list shall identify the accountable contract under which the		

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	property is held and the authorization for its use (from the contracting officer having cognizance of the property). (2) The dates during which the property will be available for use (including the first, last, and all intervening months) and, for any property that will be used concurrently in performing two or more contracts, the amounts of the respective uses in sufficient detail to support prorating the rent. (3) The amount of rent that would otherwise be charged in accordance with the clause at 52.245–9, Use and Charges. (4) The voluntary consensus standard or industry leading practices and standards to be used in the management of Government property, or existing property management plans, methods, practices, or procedures for accounting for property.		
74	(d) The contracting officer shall consider any potentially unfair competitive advantage that may result from the contractor possessing Government property. At a minimum, this shall be done by— (1) Adjusting the offers by applying, for evaluation purposes only, a rental equivalent evaluation factor; or (2) By charging the offeror rent for using the property when adjusting the offer is not practical.		

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75	(e) The contracting officer shall ensure the offeror's property management plans, methods, practices, or procedures for accounting for property are consistent with the requirements of the solicitation.		
76	Subpart 45.3—Authorizing the Use and/or Rental of Government Property 45.301 Use and rental.		
77	This subpart prescribes policies and procedures for contractor use and rental of Government Property. (a) Government property shall normally be provided on a rent-free basis in performance of the contract under which it is accountable or otherwise authorized.		
78	(b) Rental charges, to the extent authorized do not apply to the following: (1) Government property that is located in Government-owned, contractor-operated plants operated on a cost-plus-fee basis. (2) Government property that is left in place or installed on contractor-owned property for mobilization or future Government production purposes; however, rental charges shall apply to that portion of property or its capacity used for non-government commercial purposes or otherwise authorized for		

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	use.		
79	(c) The contracting officer cognizant of the Government property may authorize the rent-free use of property in the possession of nonprofit organizations when used for research, development, or educational work and— (1) The use of the property is in the national interest; (2) The property will not be used for the direct benefit of a profit-making organization; and		
80	(3) The Government receives some direct benefit, such as rights to use the results of the work without charge, from its use. (d) In exchange for consideration as determined by the cognizant contracting officer(s), the contractor may use Government property under fixed-price contracts other than the contract to which it is accountable. When, after contract award, a contractor requests the use of Government property, the contracting officer shall obtain a fair rental or other adequate consideration if use is authorized.		
81	(e) The cognizant contracting officer(s) may authorize the use of Government property on a rent-free basis on a cost-type Government contract other than		

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	the contract to which it is accountable.		
82	(f) In exchange for consideration as determined by the cognizant contracting officer, the contractor may use Government property for commercial use. Prior approval of the Head of the Contracting Activity is required where non-Government use is expected to exceed 25 percent of the total use of Government and commercial work performed.		
83	45.302 Contracts with foreign Governments or international organizations.		
84	Requests by, or for the benefit of, foreign governments or international organizations to use Government property shall be processed in accordance with agency procedures.		
85	45.303 Use of Government property on independent research and development programs.		
86	The contracting officer may authorize a contractor to use the property on an independent research and development (IR&D) program, if—		
87	(a) Such use will not conflict with the primary use of the property or enable the contractor to retain property that		

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	could otherwise be released;		
88 *	(b) The contractor agrees not to include as a charge against any Government contract the rental value of the property used on its IR&D program; and	~~*(b) The contractor agrees not to include as a charge against any Government contract the rental value of the property used on its IR&D program; and*~~ ***(b) A rental charge or other consideration is obtained under FAR 52.245-9.***	Delete – this conflicts with CAS 420 and the Contractor's CAS Disclosure Statement (4.6.0), will cause confusion and extra ordinary administrative burden to the contractor and the Government as consideration for rental costs is required under FAR 52.245-9; additional layers of consideration should not be required here.
89 *	(c) A rental charge for the portion of the contractor's IR&D program cost allocated to commercial work is deducted from any agreed-upon Government share of the contractor's IR&D costs.	~~*c) A rental charge for the portion of the contractor's IR&D program cost allocated to commercial work is deducted from any agreed-upon Government share of the contractor's IR&D costs.*~~	See comment to Line 88.
90	Subpart 45.4—Title to Government Property 45.401 Title to Government property.		
91	(a) The Government retains title to all Government-furnished property until properly disposed of, as authorized by law or regulation. Property that is leased by the Government and subsequently furnished to the contractor for use shall be considered Government-furnished property under the clause at 52.245–1, Government Property.		
92	(b) Under fixed price type contracts, the contractor retains title to all property acquired by the contractor for use on	(b) Under fixed price type contracts, the contractor retains title to all property acquired by the contractor for use on the	A contract modification may not be necessary if contractor retention and use was the original intent of the contract.

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	the contract, except for property identified as a deliverable end item. If a deliverable item is to be retained by the contractor for use after inspection and acceptance by the Government, it shall be made accountable to the contract through a contract modification listing the item as Government furnished property.	contract, except for property identified as a deliverable end item. If a deliverable item is to be ***furnished to*** ~~***retained by***~~ the contractor for use after inspection and acceptance by the Government, it shall be made accountable to the receiving contract ~~***through a contract modification listing the item***~~ as Government furnished property.	Requiring a modification serves no purpose.
93 *	(c) Under cost-type and time-and material contracts, the Government acquires title to all property to which the contractor is entitled to reimbursement as a direct item of cost, provided the property acquired is reasonable, allocable, and allowable (see Part 31). If the contractor is covered by Cost Accounting Standards, its disclosure statement may affect the charging, and consequently, the title vesting provisions.	(c) Under cost-type and time-and material contracts, the Government acquires title to all property to which the contractor is entitled to reimbursement ~~***as a direct item of cost***~~, provided the cost of the property acquired is reasonable, allocable, and allowable (see Part 31). If the contractor is covered by Cost Accounting Standards, its disclosure statement may affect the charging, and consequently, the title vesting provisions.	Clarity – and more consistent with the current and proposed title provisions. We believe there is no intent on the Government's part or the contractor's part to change how the title provisions currently function.
94	Subpart 45.5—Support Government Property Administration 45.501 Support Government property administration.		
95 *	(a) To ensure subcontractor compliance with Government property administration requirements, the property administrator assigned to the prime contract may request support property administration from another contract administration office, provided	(a) To ensure subcontractor compliance with Government property administration requirements, the property administrator assigned to the prime contract may request support property administration from another contract administration office, ~~*provided*~~	The prime contractor has responsibility for its subcontractors and will initiate such requests when warranted. The rule should not weaken privity of contract.

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	the contractor has agreed to allow such property administration.	~~*the contractor has agreed to allow such property administration*~~ *when requested by the contractor.*	
96 *	(b) In instances where the prime contractor does not agree to allow the support property administrator to provide support property administration, the prime property administrator shall immediately refer the matter to the contracting officer.	(b) In instances where the prime contractor does not *concur with the findings of the support property administrator, the prime contractor's property administrator shall mediate and resolve the differences with consultation with* ~~*immediately refer the matter to*~~ *the contracting officer.*	Allows for rapid attention and resolution with prime PA, sub PA and CO as well as the contractor and subcontractor. A team approach is better to resolving disputes than blind obedience to a disinterested party.
97 *	(c) In instances where the prime contractor does not concur with the findings of the support Property Administrator, the prime property administrator shall immediately refer the matter to the contracting officer.	~~*(c) In instances where the prime contractor does not concur with the findings of the support Property Administrator, the prime property administrator shall immediately refer the matter to the contracting officer.*~~	
98 *	(d) The prime property administrator shall accept the findings of the delegated support property administrator and advise the prime contractor of any deficiencies within the subcontractor's property management system.	~~*(d) The prime property administrator shall accept the findings of the delegated support property administrator and advise the prime contractor of any deficiencies within the subcontractor's property management system.*~~	The prime's Government property administrator should not be left powerless if unreasonable findings are submitted.
99	45.600 [Amended] 12. Amend section 45.600 by removing "Government property" and "or progress" and adding "contractor inventory" and ", progress, or performance-based" in their places, respectively.	45.600 [Amended] 12. Amend section 45.600 by removing "Government property" and "or progress" and adding "contract~~or~~ inventory" and ", progress, or performance-based" in their places, respectively.	

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100	45.601 [Removed and Reserved] 13. Remove and reserve section 45.601.		
101	PART 49—TERMINIATION OF CONTRACTS * * * * * (b) * * * (1) All subcontractor termination inventory be disposed of and accounted for in accordance with the procedures contained in paragraph (j) of the clause at 52.245–1, Government Property; and * * * * *	*TERMINATION*	Spelling
102	PART 52—SOLICIATION PROVISIONS AND CONTRACT CLAUSES 18. Revise sections 52.245–1 and 52.245–2 to read as follows:	*SOLICITATION*	Spelling
103	52.245–1 Government Property. As prescribed in 45.107(a), insert the following clause: GOVERNMENT PROPERTY (DATE) (a) Definitions. As used in this clause—		
104	Acquisition cost means— (1) For Contractor acquired property, the full cost determined in accordance with the system established by the Contractor in conformance with consistently applied sound accounting principles.	Acquisition cost ***or unit acquisition cost*** means— (1) For contractor acquired property, the ***~~full~~*** cost determined in accordance with the system established by the Contractor in conformance with consistently applied sound accounting principles.	This term "full cost" may be confusing to personnel unfamiliar with contractors' systems. See also Line 23. Unit acquisition is the required data

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			element in the clause. See also Lines 71 and 155.
105	(2) For Government furnished property, the amount identified in the contract, or in the absence of such identification, the fair market value attributed to the item by the Contractor.		
106	Common item means material that is common to the applicable Government contract and the contractor's other work.	~~*Common item means material that is common to the applicable Government contract and the contractor's other work.*~~	Superfluous; not used anywhere in PART 45. See also Line 24.
107	Contractor-acquired property means property acquired, fabricated, or otherwise provided by the Contractor for performing a contract, and to which the Government has title.		
108	Contractor's managerial personnel means the Contractor's directors, officers, managers, superintendents, or equivalent representatives who have supervision or direction of all or substantially all of the Contractor's business; all or substantially all of the Contractor's operation at any one plant or separate location.		
109	Contractor inventory means— (1) Any property acquired by and in the possession of a Contractor or	Contract~~or~~ *property* ~~*inventory*~~ means— (1) Any property acquired by ~~*or and*~~ in	More accurately defines property under contracts.

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	subcontractor under a contract for which title is vested in the Government and which exceeds the amounts needed to complete full performance under the entire contract;	the possession of a contractor or subcontractor under a contract for which title is vested in the Government ~~*and which exceeds the amounts needed to complete full performance under the entire contract;*~~	***Note:*** This change in the term and the definition avoids a conflict with the Federal Property and Administrative Service Act of 1949 and is more consistent with intent and current practice. See also Line 25.
110	(2) Any property that the Government is obligated or has the option to take over under any type of contract, e.g., as a result either of any changes in the specifications or plans thereunder or of the termination of the contract (or subcontract thereunder), before completion of the work, for the convenience or at the option of the Government; and	~~*(2) Any property that the Government is obligated or has the option to take over under any type of contract, e.g., as a result either of any changes in the specifications or plans thereunder or of the termination of the contract (or subcontract thereunder), before completion of the work, for the convenience or at the option of the Government; and*~~	See Line 109.
111	(3) Government-furnished property that exceeds the amounts needed to complete full performance under the entire contract.	~~*(3) Government-furnished property that exceeds the amounts needed to complete full performance under the entire contract.*~~	See Line 109.
112	Demilitarization means rendering a product designated for demilitarization unusable for and not restorable to, the purpose for which it was designed or is customarily used.	Demilitarization means rendering *designated equipment or material* ~~*a product designated for demilitarization*~~ unusable for, and not restorable to, the purpose for which it was designed or is customarily used	Clarity - redundant phrase. See also Line 29.
113	Discrepancies incident to shipment means all deficiencies incident to shipment of Government property to or from a Contractor's facility whereby	Discrepancies incident to shipment means ~~*all deficiencies incident to shipment of Government property to or from a contractor's facility whereby*~~	Clarity--"ALL" requirements should pass a materiality test.. Example: received 1001 washers vs. 1000 ordered.

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	differences exist between the property purported to have been shipped and property actually received.	~~differences exist~~ *(e.g. count or condition)* between the property purported to have been shipped and property actually received.	See also Line 30.
114	Equipment means a tangible article of personal property that is complete in-and-of itself, durable, nonexpendable, and needed for the performance of a contract. Equipment generally has an expected service life of one year or more, and does not ordinarily lose its identity or become a component part of another article when put into use.		
115	Government-furnished property means property in the possession of, or directly acquired by, the Government and subsequently furnished to the Contractor for performance of a contract.	*Add "Is a subset of property in the possession of a contractor (PIPC)."*	Consistent with current UID requirements and terminology See also Line 32.
116	Government property means all property owned or leased by the Government. Government property includes both Government-furnished and contractor acquired property.		
117	Material means property that may be consumed or expended during the performance of a contract, component parts of a higher assembly, or items that lose their individual identity through incorporation into an end-item. Material	Material means property that may be consumed or expended during the performance of a contract, component parts of a higher assembly, or items that lose their individual identity through incorporation into an end-item. Material	More consistent with the concept that personal property is either material or equipment.

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	does not include equipment, special tooling, special test equipment, or unique Federal property.	does not include equipment~~, special tooling, special test equipment, or unique Federal property~~.	
118	Nonseverable means property that cannot be removed after erection or installation without substantial loss of value or damage to the installed property or to the premises where installed.	Nonseverable means property that cannot be removed after ~~erection~~ *construction* or installation . . .	Better word choice. See also Line 35.
118 A		***Property In the Possession of Contractors (PIPC)*** *is defined as* ***tangible personal property to which the Government has title, which is in the stewardship, possession, or controlled by, the contractor for performance of a contract. PIPC consists of both tangible GFP and CAP, and includes equipment and material.***	Consistent with Government's new definition.
119	Precious metals means silver, gold, platinum, palladium, iridium, osmium, rhodium, and ruthenium.	Precious metals means silver, gold, platinum, palladium, iridium, osmium, rhodium, and ruthenium.	
120	Property means all tangible property, both real and personal.		
121	Property Administrator means an authorized representative of the Contracting Officer assigned the responsibility of administering the contract requirements and obligations relating to Government property in the possession of a Contractor.		

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122	Provide means to furnish existing Government property or to allow the Contractor to acquire property on behalf of the Government under this contract.	Provide *means either to furnish, as in Government-furnished property, or to acquire, as in contractor-acquired property.*	Consistent with DFARS 245.301 definition. The word "allow" could be confused with allowable – and not all allowable property charged to a fixed priced contract is contractor acquired property. See also Line 39.
123	Real property means land, land rights, buildings, structures, utility systems, steam generation systems, and equipment attached to and made part of buildings and structures (such as heating systems). As such, land rights are considered real property. It does not include foundations and other work necessary for installing special tooling, special test equipment, or equipment.	~~*Real property means land, land rights, buildings, structures, utility systems, steam generation systems, and equipment attached to and made part of buildings and structures (such as heating systems). As such, land rights are considered real property. It does not include foundations and other work necessary for installing special tooling, special test equipment, or equipment.*~~	Move to FAR Part 2 as this is where "personal property" is defined.
124	Sensitive property means property potentially dangerous to the public safety or security if stolen, lost, or misplaced, or that shall be subject to exceptional physical security, protection, control, and accountability such as classified property, weapons, ammunition, explosives, controlled substances, radioactive materials, hazardous materials or wastes, or precious metals.		
125	Surplus property means excess personal property not required by any	Surplus property means excess personal property not required by any Federal	This is normally a delegated function, e.g. Plant Clearance Officer.

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	Federal agency as determined by the Administrator of the General Services Administration (GSA).	agency as determined by the Administrator of the General Services Administration (GSA) *or as delegated.*	
126	Unique Federal Property means Government-owned personal property that is peculiar to the mission of an agency, e.g., military or space property. Unique Federal property excludes material, special test equipment, special tooling, real property and equipment.	Unique Federal Property means Government-owned *equipment* ~~*personal property*~~ that is peculiar to the mission of an agency, e.g., military or space *equipment* ~~*property*~~. Unique Federal property excludes material, special test equipment, special tooling, *and* real property. ~~*and equipment.*~~	UFP is a subset of equipment.
127	(b) Property management. (1) The Contractor shall have a system to manage (control, use, preserve, protect, repair and maintain) Government property in its possession. The system shall be adequate to satisfy the requirements of this clause. In doing so, the Contractor shall initiate and maintain the processes, systems, records, and methodologies necessary for effective control of Government property, consistent with voluntary consensus standards and/or industry-leading practices and standards for Government property management.		
128	(2) The Contractor's responsibility extends from the initial acquisition and receipt of property, through stewardship, custody, and use until formally relieved of responsibility by authorized means, including delivery,		

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	consumption, expending, disposition, or via a completed investigation, evaluation, and final determination for lost, damaged, or destroyed property. This requirement applies to all Government property under the Contractor's accountability, stewardship, possession or control, including its vendors or subcontractors (see paragraph (f)(1)(v) of this clause).		
129	(3) The Contractor shall include the requirements of this clause in all subcontracts under which Government property is acquired or furnished for subcontract performance.		
130*	(c) Use of Government property. The Contractor shall use Government property, either furnished or acquired under this contract, only for performing this contract, unless otherwise provided for in this contract or approved by the Contracting Officer. The Contractor shall not modify, cannibalize, or make alterations to Government property unless this contract specifically identifies the modifications, alterations or improvements as work to be performed.	(c) Use of Government property. The Contractor shall use Government property, either furnished or acquired under this contract, only for performing this contract, unless otherwise provided for in this contract or approved by the Contracting Officer. ~~***The Contractor shall not modify, cannibalize, or make alterations to Government property unless this contract specifically identifies the modifications, alterations or improvements as work to be performed***~~ ***Contracting Officer authorization is required for permanent and substantial alterations that have a negative impact on the property's value.***	To enable the Contracting Officer to effectively use his discretionary authority without having to modify the contract. Such approvals are generally considered routine and administrative in nature, and the requirement to modify the contract in all such instances is considered to be an undue administrative burden. Routine alterations and modification are necessary to be consistent with Line 50 that requires the maximum use of existing government property. Example: It is a common practice to switch out components of equipment when calibration or maintenance is needed rather than stop complete use of the unit. The rule should not specifically preclude

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			this long standing industry practice.
131	(d) Government-furnished property. (1) The Government shall deliver to the Contractor the Government-furnished property described in this contract. The Government shall furnish related data and information needed for the intended use of the property.		
132	(2) The Government shall retain title to all Government-furnished property; title shall not be affected by incorporation into, or attachment to, any property not owned by the Government. Government-furnished property shall not lose its identity as Government property by its attachment to real property.		
133	(3) The delivery and/or performance dates specified in this contract are based upon the expectation that the Government-furnished property will be suitable for contract performance and will be delivered to the Contractor by the dates stated in the contract.		
134	(i) If the property is not delivered to the Contractor by the dates stated in the contract, the Contracting Officer shall, upon the Contractor's timely written request, consider an equitable adjustment to the contract.		
135	(ii) In the event property is received by		

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	the Contractor in a condition not suitable for its intended use, the Contracting Officer shall, upon the Contractor's timely written request, advise the Contractor on a course of action to remedy the problem. Such action may include repairing, replacing, modifying, returning, or otherwise disposing of the property at the Government's expense. Upon completion of the required action(s) the Contracting Officer shall consider an equitable adjustment to the contract (see also paragraph (f)(1)(ii)(A) of this clause).		
136*	(iii) The Government may, at its option, furnish property in an "as is" condition. In such cases, the Government makes no warranty with respect to the serviceability and/or suitability of the property for contract performance. Any repairs, replacement, and/or refurbishment shall be at the Contractor's expense.	(iii) ~~*The Government may, at its option, furnish property in an "as is" condition. In such cases*~~ *For Government furnished property "as is" as identified in the fixed priced contract,* the Government makes no warranty with respect to the serviceability and/or suitability of the property for contract performance. Any repairs, replacement, and/or refurbishment shall be at the Contractor's expense.	See comments in CODSIA letter. Providing property "as is" must be identified in the solicitation and applies to only fixed price contracts.....this is consistent with the current "as is" clause. Without textual change, this conflicts with the Changes Clause of the contract. Can lead to procurement practices that may not result in best value to the Government which is major objective of Part 1 of the FAR. This is more of an exception than a rule and the government has the option of writing this as a special provision in a contract.
137	(4)(i) The Contracting Officer may by		

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	written notice, at any time—		
138	(A) Increase or decrease the amount of Government-furnished property under this contract;		
139	(B) Substitute other Government-furnished property for the property previously furnished, to be furnished, or to be acquired by the Contractor for the Government under this contract; or		
140	(C) Withdraw authority to use property. (ii) Upon completion of any action(s) under paragraph (d) (4) (i) of this clause, and the Contractor's timely written request, the Contracting Officer shall consider an equitable adjustment to the contract.		
141*	(e) Title to Contractor-acquired property. Title to all property purchased by the Contractor, for which the Contractor is entitled to be reimbursed as a direct item of cost, under this contract, shall pass to and vest in the Government upon—	~~(e) Title to Contractor-acquired property.~~ ~~Title to all property~~ ***purchased by the Contractor, for which the Contractor is entitled to be reimbursed, as a direct item of cost, under this contract, shall pass to and vest in the Government upon—*** ***(See Lines 141A and 141B)***	See comments in CODSIA letter. Replace with current title provisions in the Government fixed price and cost plus property clauses. Industry's understanding from the Government is that there is no intent to change from the current title provisions on cost plus and fixed price contracts. It is imperative to retain current title provisions so that there is no apparent indication of a change.
141		(e) Title. (Cost-Reimbursement, Time-	See comments in CODSIA letter.

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A *		*and-Material, or Labor-Hour Contracts)* *(1) The Government shall retain title to all Government-furnished property.* *(2) Title to all property purchased by the Contractor for which the Contractor is entitled to be reimbursed as a direct item of cost under this contract shall pass to and vest in the Government upon the vendor's delivery of such property.* *(3) Title to all other property, the cost of which is reimbursable to the Contractor, shall pass to and vest in the Government upon --* *(i) Issuance of the property for use in contract performance;* *(ii) Commencement of processing of the property for use in contract performance; or* *(iii) Reimbursement of the cost of the property by the Government, whichever occurs first. Title to each item of acquired by the Contractor for the Government under this contract shall pass to and vest in the Government when its use in performing this contract commences or when the Government has paid for it, whichever is earlier, whether or not*	

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		title previously vested in the Government. ***(4) If this contract contains a provision directing the Contractor to purchase material for which the Government will reimburse the Contractor as a direct item of cost under this contract --*** ***(i) Title to material purchased from a vendor shall pass to and vest in the Government upon the vendor's delivery of such material; and*** ***(4) All Government-furnished property and all property acquired by the Contractor, title to which vests in the Government under this paragraph (collectively referred to as "Government property"), are subject to the provisions of this clause. Title to Government property shall not be affected by its incorporation into or attachment to any property not owned by the Government, nor shall Government property become a fixture or lose its identity as personal property by being attached to any real property.***	
141 B *		***(e) Title (Fixed-Price Contracts)*** ***(1) The Government shall retain title to all Government-furnished property.***	See comments in CODSIA letter.

		all Government-furnished property. *(2) All Government-furnished property and all property acquired by the Contractor, title to which vests in the Government under this paragraph (collectively referred to as "Government property"), are subject to the provisions of this clause.* ~~*However, special tooling accountable to this contract is subject to the provisions of the Special Tooling clause and is not subject to the provisions of this clause.*~~ *Title to Government property shall not be affected by its incorporation into or attachment to any property not owned by the Government, nor shall Government property become a fixture or lose its identity as personal property by being attached to any real property.* *(3) Title to each item of equipment* ~~*facilities and special test equipment*~~ *acquired by the Contractor for the Government under this contract shall pass to and vest in the Government when its use in performing this contract commences or when the Government has paid for it, whichever is earlier, whether or not title previously vested in the Government.* *(4) If this contract contains a provision directing the Contractor to purchase*	Remove references to deleted clauses. Update of terminology.

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		material for which the Government will reimburse the Contractor as a direct item of cost under this contract -- *(i) Title to material purchased from a vendor shall pass to and vest in the Government upon the vendor's delivery of such material; and* *(ii) Title to all other material shall pass to and vest in the Government upon --* *(A) Issuance of the material for use in contract performance;* *(B) Commencement of processing of the material or its use in contract performance; or* *(C) Reimbursement of the cost of the material by the Government, whichever occurs first.*	
142*	(1) A vendor's or supplier's initial delivery of such property to the Contractor;	~~*(1) A vendor's or supplier's initial delivery of such property to the Contractor;*~~	Industry's understanding from the Government is that there is no intent to change from the current title provisions on cost plus and fixed price contracts.
143*	(2) Issuance of the property for use in contract performance, including the installation of parts through normal maintenance;	~~*(2) Issuance of the property for use in contract performance, including the installation of parts through normal maintenance;*~~	Industry's understanding from the Government is that there is no intent to change from the current title provisions on cost plus and fixed price contracts.
143 A *	(3) Commencement of processing of the property for use in contract	~~*(3) Commencement of processing of the property for use in contract*~~	Industry's understanding from the Government is that there is no intent to

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	performance; or	~~performance; or~~	change from the current title provisions on cost plus and fixed price contracts.
144*	(4) Reimbursement by the Government for the cost of the property, whichever occurs first.	~~(4) Reimbursement by the Government for the cost of the property, whichever occurs first.~~	Industry's understanding from the Government is that there is no intent to change from the current title provisions on cost plus and fixed price contracts.
145	(f) Contractor plans and systems. (1) Contractors shall develop property management plans and systems, at the contract, program, site or entity level to enable the following outcomes:		
146	(i) Acquisition of property. The Contractor shall document that all property was acquired consistent with its engineering, production planning, material control operations, and/or cost accounting disclosure statement.	(i) Acquisition of property. ~~The Contractor shall document that all property was acquired consistent with its engineering, production planning, material control operations, and/or cost accounting disclosure statement.~~	This is too prescriptive. Contractors are required to have property plans in accordance with 52.245-1(b). See Line 127.
147	(ii) Receipt of Government property. The Contractor shall receive Government property (document the receipt), record (the information necessary to meet the record requirements of paragraphs (f) (1) (iii) (A) (1), (2), (3), (4) and (5) of this clause), identify (as Government-owned), and manage any discrepancies incident to shipment.	(ii) Receipt of Government property. ~~The Contractor shall receive Government property (document the receipt), record (the information necessary to meet the record requirements of paragraphs (f)(1)(iii)(A)(1), (2), (3), (4) and (5) of this clause), identify (as Government-owned), and manage any discrepancies incident to shipment.~~	This is too prescriptive. Contractors are required to have property plans in accordance with 52.245-1(b). See Line 127.
148	(A) Government-furnished property. The Contractor shall furnish a written statement to the Property Administrator containing all relevant facts, such as cause or condition and a recommended	~~A) Government-furnished property. The Contractor shall furnish a written statement to the Property Administrator containing all relevant~~	This is too prescriptive. Contractors are required to have property plans in accordance with 52.245-1(b). See Line 127.

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	course(s) of action, if overages, shortages, or damages and/or other discrepancies are discovered upon receipt of Government-furnished property.	~~*facts, such as cause or condition and a recommended course(s) of action, if overages, shortages, or damages and/or other discrepancies are discovered upon receipt of Government-furnished property.*~~	This is handled through the Government's Report of Discrepancy (ROD) form issued as required. The ROD is processed per the ROD instructions. Resolution of this type of issue is a contracts/quality/program office issue.
149			Deleted this line as it was a duplicate of 148
150	(B) Contractor-acquired property. The Contractor shall take all actions necessary to adjust for overages, shortages, damage and/or other discrepancies discovered upon receipt, in shipment of Contractor-acquired property from a vendor or supplier, so as to ensure the proper allocability and allowability of associated costs.		
151	(iii) Records of Government property. The Contractor shall create and maintain records of all Government property accountable to the contract, including Government furnished and Contractor-acquired property.		
152	(A) Property records shall enable a complete, current, auditable record of all transactions and shall, unless otherwise approved by the Property Administrator, contain the following data:		
153	(1) The name, commercial part number and description, manufacturer, bulk identifier, model number, and National	(1) The name, commercial part, number, *if provided,* and description, manufacturer, ~~*bulk identifier,*~~ model/*part*	Not all property has a commercial part number. Bulk identifier covered by unit of measure

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	Stock Number (if needed for additional item identification tracking and/or disposition).	*number*, and National Stock Number (if needed for additional item identification tracking and/or disposition).	Not all property has a model number
154	(2) Quantity received (or fabricated), issued, and balance-on-hand.		
155	(3) Unit acquisition cost.		See Comment to Line 104.
156	(4) Unit-item identifier or equivalent (if available and necessary for individual item tracking).		
157	(5) Unit of measure.		
158	(6) Accountable contract number or equivalent code designation.		
159	(7) Location.		
160	(8) Disposition.		
161	(9) Posting reference and date of transaction.		
162*	(10) Date placed in service.	~~*(10) Date placed in service.*~~	Delete or limit to intended use, i.e. capitalized items. Not applicable to production material or expensed items (<$100K). If not deleted, there will be a needless, significant cost impact for system and process changes.
163*	(B) When approved by the Property Administrator, the Contractor may maintain, in lieu of formal property records, a file of appropriately cross-	~~*(B) When approved by the Property Administrator,*~~ ***In accordance with a contractor's property plan, the*** *Contractor may maintain,* ***in lieu of***	Contractors must have contract performance latitude – particularly for non-production contracts; engineering studies; small R&D work.

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	referenced documents evidencing receipt, issue, and use of material that is issued for immediate consumption.	*formal property records, a file of appropriately cross-referenced documents evidencing receipt, issue, and use of material that is issued for immediate consumption.*	
164	(iv) Physical inventory. The Contractor shall periodically perform, record, and report physical inventories during contract performance. A final physical inventory shall be performed upon contract completion or termination. The Property Administrator may waive this final inventory requirement, depending on the circumstances, e.g., overall reliability of the Contractor's system or the property is to be transferred to a follow-on contract.	(iv) Physical inventory. ~~*The Contractor shall periodically perform, record, and report physical inventories during contract performance. A final physical inventory shall be performed upon contract completion or termination. The Property Administrator may waive this final inventory requirement, depending on the circumstances, e.g., overall reliability of the Contractor's system or the property is to be transferred to a follow-on contract.*~~	This will be included in contractor property plans and other administrative reports.
165	(v) Subcontractor control. (A) The Contractor shall award subcontracts that clearly identify assets to be provided and shall ensure appropriate flow down of contract requirements, including any cost savings achieved as a result of its prime contract relationship with the Government.	(v) Subcontractor control. ~~*(A) The Contractor shall award subcontracts that clearly identify assets to be provided and shall ensure appropriate flow down of contract requirements, including any cost savings achieved as a result of its prime contract relationship with the Government.*~~	This will be included in contractor property plans. Should the government elect to retain this subsection, the phrase: "cost savings achieved as a result ....." has no perceived meaning and should be eliminated.
166	(B) The Contractor shall assure its subcontracts are properly administered and reviews are periodically performed to determine the adequacy of the subcontractor's property management system.	~~*(B) The Contractor shall assure its subcontracts are properly administered and reviews are periodically performed to determine the adequacy of the subcontractor's property management system.*~~	This will be included in contractor property plans.

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166 A	(vi) Reports. The Contractor shall have a process to create and provide reports including: reports of discrepancies; loss, damage and destruction; physical inventory results; audits and self-assessments; corrective actions; and other reports as directed by the Contracting Officer.	(vi) Reports. The Contractor shall have a process to create and provide reports *including: reports ~~of~~ such as* discrepancies; loss, damage and destruction; physical inventory results; audits and self- assessments; corrective actions; and other *property related* reports *relevant to the contract* as directed by the Contracting Officer.	This clarifies the requirement in that it focuses on property-related reports as opposed to reports required in other sections of the contract, e.g. CDRL's.
167	(A) Loss, damage, destruction, and theft. Unless otherwise directed by the Property Administrator, the Contractor shall investigate and promptly furnish to the Property Administrator, a written narrative of all incidents of loss, damage, destruction, or theft, as soon as the facts become known or when requested by the Government. Such reports shall, at a minimum, contain the following information:	(A) Loss, damage, *or* destruction, ~~*and theft.*~~ Unless otherwise directed by the Property Administrator, the Contractor shall investigate and promptly furnish to the Property Administrator, a written narrative of all incidents of loss, damage, or destruction, ~~*or theft*~~ as soon as the facts become known or when requested by the Government. Such reports shall, at a minimum, contain the following information:	See comments in Line 8.
168	(1) Date of incident (if known). (2) The name, commercial description, manufacturer, model number, and National Stock Number (if applicable). (3) Quantity. (4) Unique Item Identifier (if available). (5) Accountable Contract number. (6) A statement indicating current or future need. (7) Acquisition cost, or if applicable,		Suggest a "Standard Form" be developed for reporting LDD in concert with PCARSS changes. See comments in Line 8.

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	estimated scrap proceeds, estimated repair or replacement costs. (8) All known interests in commingled property of which the Government property is a part. (9) Cause and corrective action taken or to be taken to prevent recurrence. (10) A statement that the Government will receive any reimbursement covering the loss, damage, destruction, or theft, in the event the Contractor was or will be reimbursed or compensated. (11) Copies of all supporting documentation.	.....damage, *or* destruction~~, *or theft*~~, in the event the Contractor was or will be reimbursed or compensated. (11) Copies of ~~*all*~~ supporting documentation	
169	(B) The Contractor shall take all reasonable actions necessary to protect the Government property from further loss, damage, destruction, or theft. The Contractor shall separate the damaged and undamaged Government property, place all the affected Government property in the best possible order, and take such other action as the Property Administrator directs.	The Contractor shall take all reasonable actions necessary to protect the Government property from further loss, damage, *or* destruction~~, *or theft*~~. The Contractor shall separate the damaged and undamaged Government property, place all the affected Government property in the best possible order, and take such other action as the Property Administrator directs.	See comments in Line 8.
170	(C) The Contractor shall do nothing to prejudice the Government's rights to recover against third parties for any loss, damage, destruction, or theft of Government property.	(C) The Contractor shall do nothing to prejudice the Government's rights to recover against third parties for any loss, damage, *or* destruction~~, *or theft*~~ of Government property.	See comments in Line 8.
171	(D) Upon the request of the Contracting Officer, the Contractor shall, at the Government's expense, furnish to the		

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	Government all reasonable assistance and cooperation, including the prosecution of suit and the execution of instruments of assignment in favor of the Government in obtaining recovery.		
172	(vii) Relief of stewardship responsibility. Unless the contract provides otherwise, the Contractor shall be relieved of stewardship responsibility for Government property when such property is—		
173	(A) Consumed or expended, reasonably and properly, or otherwise accounted for, in the performance of the contract as determined by the Property Administrator, including reasonable inventory adjustments;	(A) Consumed or expended, reasonably and properly, or otherwise accounted for, in the performance of the contract *in accordance with the Contractor's property plan or* as determined by the Property Administrator, including reasonable inventory adjustments;	A contractor's property plan should cover normal operating practices and cite examples of expended items, such as computer mice, keyboard, stencils, cabling, safety flags, etc.
174	(B) Delivered or shipped from the Contractor's plant, under Government instructions, except when shipment is to a subcontractor or other location of the Contractor; or		
175	(C) Disposed of in accordance with paragraphs (j) and (k) of this clause.		
176	(viii) Utilizing Government property. The Contractor shall utilize, consume, and store Government property only as authorized under this contract. The Contractor shall promptly disclose and		

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	report Government property in its possession that is excess to contract performance.		
177	(ix) Maintenance. The Contractor shall properly maintain Government property. The Contractor's maintenance program shall enable the identification, disclosure, and performance of normal preventative maintenance and repair. The Contractor shall disclose and report to the Property Administrator the need for replacement and/or capital rehabilitation.		
178	(x) Property closeout. The Contractor shall promptly perform and report to the Property Administrator contract property closeout, to include reporting, investigating and securing closure of all loss, damage, destruction, or theft cases; physically inventorying all property upon termination or completion of this contract; and disposing of items at the time they are determined to be excess to contractual needs.	(x) Property closeout. The Contractor shall promptly perform and report to the Property Administrator contract property closeout, to include reporting, investigating and securing closure of all loss, damage, *or* destruction~~, *or theft*~~ cases; physically inventorying all property upon termination or completion of this contract; and disposing of items at the time they are determined to be excess to contractual needs.	See comments in Line 8.
179	(2) The Contractor shall establish and maintain Government accounting source data, as may be required by this contract, particularly in the areas of recognition of acquisitions and dispositions of material and equipment.		

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	FEDERAL REGISTER	SUGGESTED CHANGE	COMMENT
180*	(3) The Contractor shall establish and maintain procedures necessary to assess its property management system effectiveness, and shall perform periodic internal reviews and audits. The findings and/or results of such reviews and audits shall be made available to the Property Administrator.	(3) The Contractor shall establish and maintain procedures necessary to assess its *Government* property management system effectiveness, and shall perform periodic internal reviews and audits. The ***material or significant*** findings and/or results of such reviews and audits *pertaining to government property* shall be made available to the Property Administrator	See comments in CODSIA Letter. Extraneous details and work papers will not be provided. However, information that is important to the government's decision making process for Government property will be provided.
181	(g) Systems analysis. (1) The Government shall have access to the Contractor's premises, at reasonable times, for the purposes of reviewing, inspecting and evaluating the Contractor's property management systems, procedures, records, and supporting documentation.	(g) Systems analysis. (1) The Government shall have access to the Contractor's premises, at reasonable times, for the purposes of reviewing, inspecting and evaluating the Contractor's *Government* property management *plan,* systems, procedures, records, and supporting documentation *that pertains to Government property.*	See comments in CODSIA letter.
182	(2) Records of Government property shall be readily available to authorized Government personnel and shall be safeguarded from tampering or destruction.		
183*	(3) Should it be determined by the Government that the Contractor's property management practices are inadequate or not acceptable for the effective management and/or control of Government property under this contract; and/or present an undue risk to the Government, the Contractor shall	(3) Should it be determined by the Government that the Contractor's property management practices are inadequate or not acceptable for the effective management and/or control of Government property under this contract; and/or present ***a material*** risk ~~***an undue***~~ to the Government, the Contractor shall	Allows for resolution where the contractor does not believe direction provided results in best value for the Government.

	FEDERAL REGISTER	SUGGESTED CHANGE	COMMENT
	immediately take all necessary corrective actions as directed by the Property Administrator.	immediately take ~~all~~ necessary corrective actions as directed by the Property Administrator. ***In instances where the contractor does not concur with the corrective actions suggested by the Property Administrator, differences will be resolved with consultation with the Contracting Officer.***	
184	(h) Contractor Liability for Government Property. (1) Unless otherwise provided for in the contract, the Contractor shall not be liable for loss, damage, destruction, or theft to the Government property furnished or acquired under this contract, except when any one of the following applies:	(h) Contractor Liability for Government Property. (1) Unless otherwise provided for in the contract, the Contractor shall not be liable for loss, damage, *or* destruction~~, or theft~~ to the Government property furnished or acquired under this contract, except when any one of the following applies:	See comments to Line 8.
185	(i) The risk is covered by insurance or the Contractor is otherwise reimbursed (to the extent of such insurance or reimbursement).		
186	(ii) The loss, damage, destruction, or theft is the result of willful misconduct or lack of good faith on the part of the Contractor's managerial personnel. Contractor's managerial personnel, in this clause, means the Contractor's directors, officers, managers, superintendents, or equivalent representatives who have supervision or direction of all or substantially all of the Contractor's business; all or substantially all of the Contractor's	(ii) The loss, damage, *or* destruction~~, or theft~~ is the result of willful misconduct or lack of good faith on the part of the Contractor's managerial personnel. Contractor's managerial personnel, in this clause, means the Contractor's directors, officers, managers, superintendents, or equivalent representatives who have supervision or direction of all or substantially all of the Contractor's business; all or substantially all of the Contractor's operation at any one plant or	

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	FEDERAL REGISTER	SUGGESTED CHANGE	COMMENT
	operation at any one plant or separate location; or a separate and complete major industrial operation.	separate location; or a separate and complete major industrial operation.	
187	(iii) The Contracting Officer has, in writing, withdrawn the Government's assumption of risk for loss, damage, destruction, or theft, due to a determination under paragraph (g) of this clause that the Contractor's property management practices are inadequate, and/or present an undue risk to the Government, and the Contractor failed to take timely corrective action. If the Contractor can establish by clear and convincing evidence that the loss, damage, destruction, or theft of Government property occurred while the Contractor had adequate property management practices or the loss, damage, destruction, or theft of Government property did not result from the Contractor's failure to maintain adequate property management practices, the Contractor shall not be held liable.	(iii) The Contracting Officer has, in writing, withdrawn the Government's assumption of risk for loss, damage, *or* destruction~~, *or theft*~~ due to a determination under paragraph (g) of this clause that the Contractor's property management practices are inadequate, and/or present *a material* risk ~~*an undue*~~ to the Government, and the Contractor failed to take timely corrective action. If the Contractor can establish ~~*by clear and convincing evidence*~~ that the loss, damage *or* destruction~~, *or theft*~~ of Government property occurred while the Contractor had adequate property management practices or the loss, damage, *or* destruction~~, *or theft*~~ of Government property did not result from the Contractor's failure to maintain adequate property management practices, the Contractor shall not be held liable.	See comments to Line 8. "Clear and convincing evidence" standard places an undue burden on government contractors.
188	(2) The allowability of insurance costs shall be determined in accordance with 31.205–19 of the Federal Acquisition Regulation.		
189	(i) Equitable adjustment. Equitable adjustments under this clause shall be		

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	FEDERAL REGISTER	SUGGESTED CHANGE	COMMENT
	made in accordance with the procedures of the Changes clause. The right to an equitable adjustment shall be the Contractor's exclusive remedy and the Government shall not be liable to suit for breach of contract for the following—		
190	(1) Any delay in delivery of Government furnished property.		
191	(2) Delivery of Government-furnished property in a condition not suitable for its intended use.		
192	(3) An increase, decrease, or substitution of Government-furnished property.		
193	(4) Failure to repair or replace Government property for which the Government is responsible.		
194*	(j) Contractor inventory disposal. Except as otherwise provided for in this contract, the Contractor shall not dispose of Contractor inventory until authorized to do so by the Plant Clearance Officer.	(j) Contractor inventory disposal. Except as otherwise provided for in this contract, the Contractor shall not dispose of Contractor inventory until authorized to do so. ~~by the Plant Clearance Officer.~~	Many contracts are not delegated for property management or for plant clearance. It is often in the Government's best interest to dispose of GP other than through the Plant Clearance process. This is especially relevant to non-DoD contracts.
195*	(1) Scrap to which the Government has obtained title under paragraph (e) of this clause.—(i) Contractor with an approved scrap procedure. (A) The Contractor may dispose of scrap	(1) Scrap to which the Government has obtained title under paragraph (e) of this clause.—(i) Contractor with an approved scrap procedure. (A) The Contractor may dispose of scrap *resulting from*	The scrap plan/agreement should cover all items that would generally be produced under the contract. There is no need to require disposition schedules if the disposition guidance is covered in the

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	FEDERAL REGISTER	SUGGESTED CHANGE	COMMENT
	resulting from production or testing under this contract without Government approval. However, if the scrap requires demilitarization or is sensitive property, the Contractor shall submit the scrap on an inventory disposal schedule.	*production or testing* under this contract without Government approval. However, if the scrap requires demilitarization, ~~or~~ *is sensitive property or is not covered under the contractor's property plan,* the Contractor shall submit the scrap on an inventory disposal schedule.	contract via the scrap procedure. Plans approved by the program office contracting officer may be developed with more expertise and understanding of the contract requirements than those considered necessary by plant clearance officers. Taking items out of controlled environments for disposition purposes, may result in higher risk to the contracting parties.
196*	(B) For scrap from other than production or testing the Contractor may prepare scrap lists in lieu of inventory disposal schedules (provided such lists are consistent with the approved scrap procedures), except that inventory disposal schedules shall be submitted for scrap aircraft or aircraft parts and scrap that— (1) Requires demilitarization; (2) Is a classified item; (3) Is generated from classified items; (4) Contains hazardous materials or hazardous wastes; (5) Contains precious metals; or (6) Is dangerous to the public health, safety, or welfare. (ii) Contractor without an approved scrap procedure. The Contractor shall submit an inventory disposal schedule for all scrap.	B) For scrap from other than production, *overhaul, repair* or testing the Contractor may prepare scrap lists in lieu of inventory disposal schedules (provided such lists are consistent with the approved scrap procedures). ~~*except that inventory disposal schedules shall be submitted for scrap aircraft or aircraft parts and scrap that—*~~ ~~*(1) Requires demilitarization;*~~ ~~*(2) Is a classified item;*~~ ~~*(3) Is generated from classified items;*~~ ~~*(4) Contains hazardous materials or hazardous wastes;*~~ ~~*(5) Contains precious metals; or*~~ ~~*(6) Is dangerous to the public health, safety, or welfare.*~~ (ii) Contractor without an approved scrap procedure. The Contractor shall submit an inventory disposal schedule for all scrap.	Individual contracts should address disposition of aircraft parts under such contracts. New detailed lists and requirements will be a major cost driver in that it may require new detailed processes. For instance, where a contract is to modify an aircraft, structural parts typically are put in scrap totes and disposition as part of production scrap. To require separate records, care and handling will drive costs unnecessarily. This is contrary to current practices under long term arrangements.
197	(2) Predisposal requirements. Once the Contractor determines that Contractor	(2) Predisposal requirements. Once the Contractor determines that Contractor	Internal or program screening for use on other site contracts should occur before

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	FEDERAL REGISTER	SUGGESTED CHANGE	COMMENT
	acquired property is no longer needed for contract performance, the Contractor in the following order of priority—	acquired property is no longer needed for contract performance, ***under this contract or other contracts,*** the Contractor in the following order of priority—	items are processed through plant clearance. This type of screening already is in place for DoD contractors that operate under a MMAS.
198	(i) May purchase the property at the acquisition cost;		
199	(ii) Shall make reasonable efforts to return unused property to the appropriate supplier at fair market value (less, if applicable, a reasonable restocking fee that is consistent with the supplier's customary practices); and	(ii) Shall make reasonable efforts to return unused property to the appropriate supplier at fair market value (less, if applicable, a reasonable restocking fee that is consistent with the supplier's ~~*customary*~~ practices); and	Redundant – by definition a practice is done customarily.
200	(iii) Shall list, on Standard Form 1428, Inventory Disposal Schedule, property that was not purchased under paragraph (j)(2)(i) of this clause, could not be returned to a supplier, or could not be used in the performance of other Government contracts.	(iii) Shall list, on Standard Form 1428, Inventory Disposal Schedule, ~~***property that was not purchased under paragraph (j)(2)(i) of this clause, could not be returned to a supplier, or could not be used in the performance of other Government***~~	Redundant with (i) and (ii).
201	(3) Inventory disposal schedules. (i) The Contractor shall use Standard Form 1428, Inventory Disposal Schedule, to identify—	(3) Inventory disposal schedules. (i) The Contractor shall use Standard Form 1428, Inventory Disposal Schedule, or *electronic equivalent,* to identify—	Need to accommodate PCARSS.
202	(A) Government-furnished Property that is no longer required for performance of this contract, provided the terms of another Government contract do not require the Government to furnish that property for performance of this		

	FEDERAL REGISTER	SUGGESTED CHANGE	COMMENT
	contract;		
203	(B) Contractor acquired property, to which the Government has obtained title under paragraph (e) of this clause, which is no longer required for performance of that contract; and		
204	(C) Termination inventory.		
205	(ii) The Contractor may annotate inventory disposal schedules to identify property the Contractor wishes to purchase from the Government.		
206	(iii) Unless the Plant Clearance Officer has agreed otherwise, or the contract requires electronic submission of inventory disposal schedules, the Contractor shall prepare separate inventory disposal schedules for—	~~(iii) Unless the Plant Clearance Officer has agreed otherwise, or the contract requires electronic submission of inventory disposal schedules, the Contractor shall prepare separate inventory disposal schedules for—~~	Individual schedules are no longer required per Part 45.6.
207	(A) Special test equipment with commercial components;	~~(A) Special test equipment with commercial components;~~	
208	(B) Special test equipment without commercial components;	~~(B) Special test equipment without commercial components;~~	
209	(C) Printing equipment;	~~(C) Printing equipment;~~	
210	(D) Information technology (e.g., computers, computer components, peripheral equipment, and related equipment);	~~(D) I~~**~~nformation technology (e.g., computers, computer components, peripheral equipment, and related equipment);~~**	

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	FEDERAL REGISTER	SUGGESTED CHANGE	COMMENT
211	(E) Precious metals;	~~*(E) Precious metals;*~~	
212	(F) Nonnuclear hazardous materials or hazardous wastes; or	~~*(F) Nonnuclear hazardous materials or hazardous wastes; or*~~	
213	(G) Nuclear materials or nuclear waste	~~*(G) Nuclear materials or nuclear waste*~~	
214	(iv) The Contractor shall describe the property in sufficient detail to permit an understanding of its intended use. Property with the same description, condition code, and reporting location may be grouped in a single line item.	(iv) ~~*The Contractor shall describe the property in sufficient detail to permit an understanding of its intended use.*~~ *The Contractor shall describe the property consistent with the requirements contained in Part 52.245-1(f)(iii).* Property with the same description, condition code, and reporting location may be grouped in a single line item.	Consistent with existing reporting requirements.
215	(4) Submission requirements. The Contractor shall submit inventory disposal schedules to the Plant Clearance Officer no later than—		
216	(i) 30 days following the Contractor's determination that a Government property item is no longer required for performance of this contract;	(i) 30 days following the Contractor's determination that a Government property item is no longer required~~*. for performance of this contract;*~~	Internal screening with other site contracts must adequately occur.
217	(ii) 60 days, or such longer period as may be approved by the Plant Clearance Officer, following completion of contract deliveries or performance; or		
218	(iii) 120 days, or such longer period as may be approved by the Termination		

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	FEDERAL REGISTER	SUGGESTED CHANGE	COMMENT
	Contracting Officer following contract termination in whole or in part.		
219	(5) Corrections. The Plant Clearance Officer may—		
220	(i) Reject a schedule for cause (e.g., contains errors, determined to be inaccurate); and		
221	(ii) Require the Contractor to correct an inventory disposal schedule.		
222	(6) Post submission adjustments. The Contractor shall notify the Plant Clearance Officer at least 10 working days in advance of its intent to remove an item from an approved inventory disposal schedule. Upon approval of the Plant Clearance Officer, or upon expiration of the notice period, the Contractor may make the necessary adjustments to the inventory schedule.	(6) Post submission adjustments. The Contractor shall notify the Plant Clearance Officer ~~at least 10 working days in advance~~ of its intent to remove an item from an approved inventory disposal schedule. ~~Upon approval of the Plant Clearance Officer, or upon~~ ~~**expiration of the notice period, the Contractor may**~~ ***and*** make the necessary adjustments to the inventory schedule.	Enables reutilization within the contract, which is a top priority. Normally, this occurs on an exception basis when new information is surfaced.....timing is usually not controllable.
223	(7) Storage. (i) The Contractor shall store the property identified on an inventory disposal schedule pending receipt of disposal instructions. The Government's failure to furnish disposal instructions within 120 days following acceptance of an inventory disposal schedule may entitle the Contractor to an equitable adjustment for costs incurred to store such property on or		

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	FEDERAL REGISTER	SUGGESTED CHANGE	COMMENT
	after the 121st day.		
224	(ii) The Contractor shall obtain the Plant Clearance Officer's approval to remove Government property from the premises where the property is currently located prior to receipt of final disposition instructions. If approval is granted, any costs incurred by the Contractor to transport or store the property shall not increase the price or fee of any Government contract. The storage facility shall be appropriate for assuring the property's physical safety and suitability for use. Approval does not relieve the Contractor of any liability for such property under this contract.	~~*(ii) The Contractor shall obtain the Plant Clearance Officer's approval to remove Government property from the premises where the property is currently located prior to receipt of final disposition instructions. If approval is granted, any costs incurred by the Contractor to transport or store the property shall not increase the price or fee of any Government contract. The storage facility shall be appropriate for assuring the property's physical safety and suitability for use. Approval does not relieve the Contractor of any liability for such property under this contract.*~~ ***(ii) The Contractor shall notify the Plant Clearance Officer when property that is on a plant clearance case is relocated prior to final disposition instructions.***	Contractors are already required to have a system in place to manage movement and storage of government property.
225	(8) Disposition instructions. (i) If the Government does not furnish disposition instructions to the Contractor within 45 days following acceptance of a scrap list, the Contractor may dispose of the listed scrap in accordance with the Contractor's approved scrap procedures.	(8) *Scrap* disposition instructions. (i) If the Government does not furnish disposition instructions to the Contractor within *45* ***days*** following acceptance *of the* ***inventory schedule*** *or scrap list,* the Contractor may dispose of the listed scrap in accordance with the Contractor's approved scrap procedures.	Should not be limited to scrap lists. ***Note:*** An inventory schedule can be a scrap list.

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	FEDERAL REGISTER	SUGGESTED CHANGE	COMMENT
226	(ii) The Contractor shall prepare for shipment, deliver f.o.b. origin, or dispose of Contractor inventory as directed by the Plant Clearance Officer. If not returned to the Government, the Contractor shall remove and destroy any markings identifying the property as U.S. Government-owned property prior to its disposal.		
227	(iii) The Contracting Officer may require the Contractor to demilitarize the property prior to shipment or disposal. In such cases, the Contractor may be entitled to an equitable adjustment under paragraph (i) of this clause.		
228	(9) Disposal proceeds. The Contractor shall credit the net proceeds from the disposal of Contractor inventory to the price or cost of work or as the Contracting Officer directs.	(9) Disposal proceeds. The Contractor shall credit the net proceeds from the disposal of ~~*Contractor inventory*~~ ***contract property*** to the price or cost of work or as the Contracting Officer directs.	
229	(10) Subcontractor inventory disposal schedules. The Contractor shall require its Subcontractors to submit inventory disposal schedules to the Contractor in accordance with the requirements of paragraph (j)(4) of this clause.	~~*(10) Subcontractor inventory disposal schedules. The Contractor shall require its Subcontractors to submit inventory disposal schedules to the Contractor in accordance with the requirements of paragraph (j)(4) of this clause.*~~	This is covered by the requirements of the prime. There is a need for the prime to be able to delegate submission of inventory schedules directly to Plant Clearance Officers as currently allowed in PCARSS. This provision also limits the prime's ability to minimize administrative costs.
230	(k) Abandonment of Government property.		
231*	(1) The Government shall not abandon	(1) The Government shall not abandon	We need mutual consent for all

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	FEDERAL REGISTER	SUGGESTED CHANGE	COMMENT
	sensitive Government property or termination inventory without the Contractor's written consent.	~~sensi~~tive Government property or termination inventory without the Contractor's written consent.	abandoned property. This could be a substantial cost to the contractor. Abandonment is generally a good option for the contract parties, especially when continued care and handling costs exceed expected proceeds or benefits to the Government.
232*	(2) The Government, upon notice to the Contractor, may abandon any nonsensitive Government property in place, at which time all obligations of the Government regarding such property shall cease.	~~(2) The Government, upon notice to the Contractor, may abandon any nonsensitive Government property in place, at which time all obligations of the Government regarding such property shall cease.~~	We need mutual consent for all abandoned property. This could be a substantial cost to the contractor.
233*	(3) The Government has no obligation to restore or rehabilitate the Contractor's premises under any circumstances; however, if Government—furnished property is withdrawn or is unsuitable for the intended use, or if other Government property is substituted, then the equitable adjustment under paragraph (i) of this clause may properly include restoration or rehabilitation costs.	(3) ~~The Government has no obligation to restore or rehabilitate the Contractor's premises under any circumstances; however,~~ If Government—furnished property is withdrawn or is unsuitable for the intended use, or if other Government property is substituted, then the equitable adjustment under paragraph (i) of this clause may properly include restoration or rehabilitation costs.	Unnecessary language – overly restrictive.
234	(l) Communication. All communications under this clause shall be in writing.		
235	(m) Overseas Contracts. If this contract is to be performed outside of the United States and its outlying areas, the words "Government" and "Government-		

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	FEDERAL REGISTER	SUGGESTED CHANGE	COMMENT
	furnished" (wherever they appear in this clause) shall be construed as "United States Government" and "United States Government-furnished," respectively.		
236	(End of clause) Alternate I (Date). As prescribed in 45.107(a)(2), substitute the following for paragraph (h)(1) of the basic clause:		
237	(h)(1) The Contractor assumes the risk of, and shall be responsible for, any loss, damage, destruction, or theft of Government property upon its delivery to the Contractor as Government-furnished property. However, the Contractor is not responsible for reasonable wear and tear to Government property or for Government property properly consumed in performing this contract.	(h)(1) The Contractor assumes the risk of, and shall be responsible for, any loss, damage, ***or*** destruction~~, ***or theft***~~ of Government property upon its delivery to the Contractor as Government-furnished property. However, the Contractor is not responsible for reasonable wear and tear to Government property or for Government property properly consumed in performing this contract.	See comments to Line 8.
238			Extra line
239	Alternate II (Date). As prescribed in 45.107(a)(3), substitute the following for paragraph (e) of the basic clause:		
240	(e) Title to property (and other tangible personal property) purchased with funds available for research and having an acquisition cost of less than $5,000 shall vest in the Contractor upon acquisition or as soon thereafter as feasible; provided that the Contractor		

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	FEDERAL REGISTER	SUGGESTED CHANGE	COMMENT
	obtained the Contracting Officer's approval before each acquisition. Title to property purchased with funds available for research and having an acquisition cost of $5,000 or more shall vest as set forth in this contract. If title to property vests in the Contractor under this paragraph, the Contractor agrees that no charge will be made to the Government for any depreciation, amortization, or use under any existing or future Government contract or subcontract thereunder. The Contractor shall furnish the Contracting Officer a list of all property to which title is vested in the Contractor under this paragraph within 10 days following the end of the calendar quarter during which it was received. Vesting title under this paragraph is subject to civil rights legislation, 42 U.S.C. 2000d. Before title is vested and by signing this contract, the Contractor accepts and agrees that—		
241	"No person in the United States or its outlying areas shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be otherwise subjected to discrimination under this contemplated financial assistance (title to property)."		
242	52.245–2 Government Property		

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	FEDERAL REGISTER	SUGGESTED CHANGE	COMMENT
	(Installation Operations for Services). As prescribed in 45.107(b), insert the following clause: Government Property (Installation Operations for Services) (Date)		
243	(a) This Government Property is furnished to the Contractor in an "as-is, where is" condition. The Government makes no warranty regarding the suitability for use of the Government property specified in this contract. The Contractor shall be afforded the opportunity to inspect the Government property as specified in the solicitation.		
244	(b) The Government bears no responsibility for repair or replacement of any lost, damaged or destroyed Government property. If any or all of the Government property is lost, damaged or destroyed or becomes no longer usable, the Contractor shall be responsible for replacement of the property at Contractor expense. The Contractor shall have title to all replacement property and shall continue to be responsible for contract performance.		
245	(c) Unless the Contracting Officer determines otherwise, the Government abandons all rights and title to unserviceable (i.e., scrap) property resulting from contract performance.		

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	FEDERAL REGISTER	SUGGESTED CHANGE	COMMENT
	Upon notification to the Contracting Officer, the Contractor shall remove such property from the Government premises and dispose of it at Contractor expense.		
246	(d) Except as provided in this clause, Government property furnished under this contract shall be governed by the Government Property clause of this contract. (End of clause)		
247	52.245–3 through 52.245–8 [Removed and Reserved]		
248	19. Remove and reserve sections 52.245–3 through52.245–8.		
249	20. Amend section 52.245–9 by—		
250	a. Removing from the introductory paragraph "45.106(h)" and adding "45.107(c)" in its place;		
251	b. Revising the date of the clause; and		
252	c. Revising in paragraph (a) the definitions "Acquisition cost", "Government property", and "Real property".		
253	The revised text reads as follows: 52.245–9 Use and Charges. * * * * * USE AND CHARGES (DATE)		

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	FEDERAL REGISTER	SUGGESTED CHANGE	COMMENT
	(a) * * * Acquisition cost means—	Acquisition cost means—	
254	(1) For Contractor acquired property, the full cost determined in accordance with the system established by the Contractor in conformance with consistently applied sound accounting principles.	(1) For contractor acquired property, the ~~full~~ cost determined in accordance with the system established by the Contractor in conformance with consistently applied sound accounting principles.	This term may be confusing to personnel unfamiliar with contractors' systems.
255	(2) For Government-furnished property, the amount identified in the contract, or in the absence of such identification, the fair market value attributed to the item by the Contractor.		
256	Government property means all property owned or leased by the Government. Government property includes both Government-furnished and Contractor acquired property.		
257	Real property means land, land rights, buildings, structures, utility systems, steam generation systems, and equipment attached to and made part of buildings and structures (such as heating systems). As such, land rights are considered real property. It does not include foundations and other work necessary for installing special tooling, special test equipment, or equipment. * * * * *		
258	52.245–10 through 52.245–19		

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	FEDERAL REGISTER	SUGGESTED CHANGE	COMMENT
	[Removed and Reserved]		
259	21. Remove and reserve sections 52.245–10 through 52.245–19.		

2004-026-28

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Public Comments on Federal Acquisition Regulation; Government Property:========

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General Comment:Please refer to the attachment for my comments on Case 2004-025.

Thank you.

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2004-025-34

FAR Case 2004-025 Comments

1. Page 54882, first column, 31.205-40 [Amended]

   It has been proposed to amend FAR 31.205-40, which reads: "(a) The terms "special tooling" and "special test equipment" are defined in 45.101." The proposed amendment involves replacing "45.101" with "2.101(b)." Currently 45.101 contains the definitions for "special tooling" and "special test equipment," while 2.101(b) does not currently contain these two definitions. Is 2.101(b) going to be amended to include these definitions?

2. Page 54887, third column, (i) Equitable Adjustment

   A. Specify the "Changes clause" indicated in the first sentence.

   B. The second sentence states, "The right to an equitable adjustment shall be the Contractor's exclusive remedy and the Government shall not be liable to suit for breach of contract for the following." The "following" involve "Government-Furnished property" and "Government Property for which the Government is responsible."

   This sentence seems to be somewhat limiting. For instance, if a Contractor must rely on Government-furnished property in order to perform work on a Government contract and the Government-furnished property is delayed, received in an unsuitable condition for its intended use, substituted, not repaired or replaced, etc. as outlined in FAR 52.245-1(i)(1)-(4), the contract may not be completed and equitable adjustment may not be a sufficient remedy for the Contractor.

3. Page 54888, second column, "(4) Submission requirements...(i) 30 days following the Contractor's determination that a Government property item is no longer required for performance of this contract;"

   30 days may be not be a sufficient amount of time for Contractors to produce inventory disposal schedules for submission to the Plant Clearance Officer.

   Either amend (i) to state "30 days, or such longer period as may be approved by the Plant Clearance Officer [Government Property Administrator], following the Contractor's determination that a Government property item is no longer required for performance of this contract;" or incorporate (i) and (ii) to indicate "60 days, or such longer period as may be approved by the Plant Clearance Officer, following (A) Contractor's determination that a Government property item is no longer required for performance of this contract; (B) completion of contract deliveries or performance."

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2004-025-35

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Subject FAR Case 2004-025 Recommended Changes

General Services Administration,
November 18, 2005
Regulatory Secretariat (VIR)
800 F Street, NW Room 4035
ATTN: Laurieann Duarte,
Washington, DC 20405

Ms. Duarte,

Please reference: FAR Case 2004-025

I am forwarding my recommended changes to the proposed Government property regulations.

1. The clause at 52.245-1Government Property does not have a definition for â€œstewardshipâ€œ or â€œstewardship responsibility.â€□ The word â€œstewardshipâ€œ is mentioned in 52.245-1 (b)(2) twice and also in 52.245-1(f)(vii) Relief of stewardship responsibility. If an official of the Government is to relieve the contractor of stewardship it makes sense to define what it means within the context of this clause.
Recommendation: Provide a definition of â€œstewardshipâ€œ and/or â€œstewardship responsibilityâ€œ in the definition section of this clause. Nonexistent or ambiguous terms create compliance problems.

2. The clause at 52.245-1 Government Property does not have a definition for an â€œapproved scrap procedure.â€□ This term is used in 52.245-1(j)(1) Contractor inventory disposal.
Recommendation: Provide a definition of an â€œapproved scrap procedureâ€œ in the definition section of this clause. Nonexistent or ambiguous terms create compliance problems.

3. The clause at 52.245-1 Government Property does not have a definition for â€œpersonal property.â€□ This term is used in (a) Definitions when defining â€œEquipment,â€□ â€œProperty,â€□ â€œSurplus property,â€œ and â€œUnique Federal Property.â€□ It is also used in Subpart 4.101 Definitions: â€œProperty means all tangible property, both real and personal.â€□
Recommendation: Provide a definition of â€œpersonal propertyâ€œ in the definition section of this clause. Nonexistent or ambiguous terms create compliance problems.

4. The clause at 52.245-1 Government Property does not have a definition for â€œindustry-leading practicesâ€□ or â€œindustry- leading practices and standards.â€□ This term is used in (b)(1) â€œThe system shall be adequate to satisfy the requirements of this clause. In doing so, the Contractor shall initiate and maintain the processes, systems, records and methodologies necessary for effective control of Government property, consistent with voluntary consensus standards and/or industry-leading practices and standards for Government property management.â€□ Voluntary Consensus Standards is defined in section 2.101 but industry-leading practices and standards are not.
Recommendation: Provide a definition of â€œindustry-leading practicesâ€□

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and/or industry-leading practices and standardsâ€□ in the definition section of this clause. If it not important enough to be defined then omit it from the clause. Nonexistent or ambiguous terms create compliance problems.

Subpart 45.105 Analysis of contractorsâ€™ property management system (b) This section states â€œif the contractor does not correct the deficiencies in accordance with the schedule, the contracting officer shall notify the contractor, in writing, that failure to take the required corrective action(s) may result inâ€"(1) Contract price adjustment;â€□ The Government Property Clause at 52.245-1 does not contain adequate language sufficient to enable the Contracting Officer to effect contract price adjustment.
Recommendation: The Government Property Clause at 52.245-1 needs language that would strengthen the Contracting Officers position to effect â€œcontract price adjustment.â€□ Contracting Officers who saw â€œcontract price adjustmentâ€œ in 45.105 (b) expressed a concern that this would be difficult to obtain unless the Government provided enablers in the Government Property Clause at 52.245-1. The recommendation was either to provide the enablers in 52.245-1 or omit it in 45.105.

Respectfully submitted,

John I. Paciorek, Ph.D

2004-025-36

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11/18/2005 04:29 PM

To "'farcase.2004-025@gsa.gov'" <farcase.2004-025@gsa.gov>
cc
bcc
Subject Comments relevant to FAR Case 2004-025

The Social Security Administration submits the following comments on FAR Case 2004-025:

1. We believe that the rewrite does, for the most part, streamline and clarify the polices and procedures governing Government furnished property. However, we believe additional clarification is needed with respect to the applicability of FAR Part 45 to Government property that is, or is included in, Government owned or controlled office space that a contractor is authorized to use when performing under a contract.

Based on discussions with others in the contracting community, there is disagreement regarding the treatment of government property such as desks, computers, phones, etc, that remain under the government's control as government furnished property subject to the requirement in FAR Part 45. After reviewing the revisions to the affected subparts, particularly language in the new clause at 52.245-1, we do not believe the intent of the revisions is to cover the aforementioned circumstances. If this is in fact correct, then we believe this should be made clear. However, if this interpretation is incorrect, then we believe there should be an additional alternate to the clause at 52.245-1, or a new clause, that specifically addresses the contractor's use of government property that never leaves the government's possession and for which the government retains responsibility.

2. The FAR councils requested comments on the updated clause at 52.245-1, specifically as to the clarity of its intent. We believe this revised clause is very clear in its intent, and in fact its clarity was the impetus behind comment #1, above.

Thank you for the opportunity to comment.
Pamela J. Kontz

2004-025-37

PARSONS

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November 18, 2005

General Services Administration
Regulatory Secretariat (VIR)
1800 F Street,NW, room 4035
ATTN: Ms. Laurieann Duarte
Washington, DC 20405

Subject: Federal Acquisition Regulation; Government Property

Reference: FAR Case, 2004-025

Dear Ms. Duarte,

Parsons appreciates this opportunity to submit comments on this proposed rule. It has truly been a long and challenging journey for the FAR Part 45 re-write.

We are very much looking forward to the implementation of this proposed rule. Many of the proposed changes have been requested by Contractor Property Administrators and Government Property Administrator's alike for many years. We take no issue with any of the proposed changes but ask for further clarification regarding how the proposed rule addresses flowdowns to subcontractors from the prime regarding risk of loss? The original language is absent in the proposed rule. While the proposed rule does address that liability rests with the Contractor it does not address relieving the Subcontractor of liability with advance approval from the Contracting Officer. Recommend inclusion of language found at 52.245-5 paragraph (g)(4) of the current FAR....."the Contractor shall require the subcontractor to assume the risk of, and be responsible for, any loss or destruction of, or damage to, the property while in the subcontractor's possession or control, except to the extent that the subcontract, with the advance approval of the Contracting Officer, relieves the subcontractor from such liability." This verbiage should be found at 45.104(b) of the proposed rule.

Thank you for considering this comment.

Respectfully,

Marc Radin

Marc Radin
Vice President,
Contracts and Procurement

2004-025-38

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11/18/2005 05:22 PM

To farcase.2004-025@gsa.gov
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Subject Public Submission

Please Do Not Reply This Email.

Public Comments on Federal Acquisition Regulation; Government Property:========

Title: Federal Acquisition Regulation; Government Property
FR Document Number: 05-18516
Legacy Document ID:
RIN:
Publish Date: 09/19/2005 00:00:00
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Comment Info: ==========

General Comment:As a Government employee, I have been following the pending revisions of FAR 45 (Government Property) for some time. Some of the revisions would lead the Government from the "frying pan to the fire". With this re-write (Proposed Rule), I am somewhat pleased, but hesitant. Our taxpayers spend too much money on the Government, for Contractors, as well as other Government employees, not to be held accountable.

Therefore, I am pleased (and I hope I have not overlooked it) that there will not be a "threshold" of accountability. Under a prior revision, I read that the Contractor would not have to account for any Government property costing less than $5,000. We have a multi-million dollar contract with millions of dollars of GFP in the hands of the Contractor. This is a very unique contract and we do require our Contractors to account for every item (dollar), with the exception of consumables, etc. If we allowed our Contractors to NOT account for every item that costs $5,000 or less, I can imagine the LDD's, not counting the costs to the Taxpayers. Secondly, I feel that the Government should be more vigilant to what the Contractor is spending; therefore, I don't see a problem with the Government being the Fidicary of Records, BUT there must be set standards for everyone to follow and DOD should instruct and set the standards for everyone under DOD (Defense Departments). Example: Groups like DPAS and few others would love to separate the financial responsibilities among the agencies, i.e., Navy, Army, etc., but these groups DO NOT understand GFP. IF DPAS does not have anyone trained regarding GFP property management courses (certified by DAU), how can they adequately help us with the financial aspects?

In addition, I do feel that some of the paperwork is overburdening, but VERY

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IMPORTANT. If the work can be placed on the computer, in lieu of paper, I welcome it, but accountability of Government's assets are extremely important, not only to me as a Taxpayer, but to all Taxpayers in America! THANKS!

2004-025-39

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C. 20460

NOV 16 2005

OFFICE OF
ADMINISTRATION
AND RESOURCES
MANAGEMENT

General Services Administration
FAR Secretariat (MVA)
1800 F Street, NW, Room 4035
ATTN: Laurieann Durate
Washington, DC 20405

Dear Ms. Durate,

Thank you for the opportunity to comment on the proposed rule to amend Part 45 of the Federal Acquisition Regulation (FAR) relating to Government Property. The Environmental Protection Agency (EPA) has reviewed the proposed rule, FAR Case 2004-025, that was published in the Federal Register on September 19, 2005.

We offer the following comments for your consideration.

1. Reference FAR 45.105(b)(1) - We do not believe that a **contract price adjustment** is an appropriate remedy to be used if a contractor fails to correct cited deficiencies in the time frame established by a corrective action schedule for the following reasons:

- It would be very difficult to quantify the contract price adjustment associated with the failure to correct system deficiencies in a timely manner.

- EPA does not have Administrative Contracting Officers, who could compute the total contract price adjustment (for all contracts) associated with a contractor's failure to take required and timely corrective actions. Therefore, the Contracting Officer for each contract would have to determine whether a contract price adjustment is appropriate. This could lead to inconsistent treatment from one contract to another.

- The use of contract price adjustments could result in extensive litigation being brought forth by contractors.

- Contractors who fail to make timely corrections to deficiencies cited in other system reviews (i.e., estimating systems, labor systems, purchasing systems) are not subject to contract price adjustments. This creates another consistency issue.

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- Other alternatives can be used, in lieu of contract price adjustments, to encourage contractors to correct their cited deficiencies in a timely manner (see FAR 45.105(b)(2) and (3)).

2. The proposed rule indicates that the Government intends to rely heavily on the contractors' commercial practice to manage and dispose of Government property. However, commercial contractors do not provide property to other contractors under their contracts. Instead, contractors have developed procedures designed to dispose of their own property. It is therefore unclear, how the use of "commercial practices" will apply to the management of Government property under Government contracts.

3. The previous language in FAR 45.302-1 effected a broad prohibition on furnishing property to contractors, with very limited exceptions. The proposed language in FAR 45.102(b) simply states that Contracting Officers shall provide property to contractors when it is clearly demonstrated: (1) to be in the government's best interest; (2) the benefit outweighs the increased cost of administration; (3) providing the property does not substantially increase the Government's risk; and, (4) the government's requirements cannot otherwise be met. We are concerned that the proposed rule will make furnishing property to contractors much easier administratively, and consequently will result in more Government property being furnished to contractors.

If you have questions or require additional information, I can be reached on (202) 564-4315, or you may have a member of your staff contact Larry Wyborski in our Policy and Oversight Service Center on (202) 564-4369, or email Wyborski.Larry@epa.gov.

Sincerely,

Ronald L. Kovach, Director
Policy, Training and Oversight Division
Office of Acquisition Management

2004-025-40

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To farcase.2004-025@gsa.gov
cc "Baileymuller, Norma (HQ DLA)" <Norma.Baileymuller@dla.mil>, "Drost, Kate (HQ DLA)" <Kate.Drost@dla.mil>, "Stevenson, Samuel (HQ DLA)"
bcc
Subject Public Comment for FAR Case 2004-025

Ms. Parnell,
I apologize for submitting this agency comment from Defense Logistics Agency (DLA) after the due date. If I can be of further assistance, just let me know.
V/R,

Kerry Pilz
Acquisition Policy Branch, J-3311
Defense Logistics Agency
703-767-1461

The Defense Logistics Agency (DLA) submits the following comments regarding FAR Case 2004-025.

FAR Case 2004-025 (Federal Acquisition Regulation; Government Property) eliminates a current FAR clause (52.245-17, Special Tooling). The elimination of the 52.245-17, Special Tooling clause and its class deviation (DoD 98-O0011), will greatly reduce the visibility and accountability of government-owned tooling that is held in the possession of contractors. DLA recommends the substance of the DoD class deviation to the special tooling clause be retained in Part 45 as an optional paragraph in ALT III of the basic property clause, 52.245-1.

Background:

The existing special tooling clause, 52.245-17, is specific on how and when the government takes title to the property. DLA utilizes a DoD class deviation (98-O0011) to that clause that details the recordkeeping required by contractors to maintain accurate accounts. The clause provides disposition instruction for the contractor and the government on how tooling is to be shipped and disposed. It indicates how the tooling is to be marked and identified to the government to maintain consistent accountability. Without the clause, the inherent risk of loosing or misplacing government owned tooling will increase causing greater expenditures to replace the lost special tooling. Manufacturing processes will be negatively impacted due to the wait times involved in replacing the lost special tooling. Customer requirements will be delayed or unfulfilled. Taxpayer dollars would be better employed in procuring new items than in replacing misplaced or lost special tooling.

In DLA over a thousand tooling requests are processed each year for tooling that each costs thousands of dollars. DLA currently owns 6,000 pieces of special tooling and borrows another 8,000 from the Services for a total of 14,000 pieces. The tooling is used to make aircraft, ship, and tank parts, such as engine turbines, cable assemblies, and ejection seats. The tooling can be quite small as for dies and jigs, and also quite large, weighing as much as 20,000 lbs. While the 14,000 pieces of special tooling are not all being used at any one time for a contract, they can be in located in many geographic locations throughout the U.S. to include military bases and contractor locations overseas including England and Israel. DLA is responsible for the tooling that is borrowed from the Services. DCMA is not responsible for providing property administration services for these contracts containing special tooling as many are for small dollar value orders and are awarded on an FOB destination basis. There is no in-plant DCMA inspector as there would be for large weapons systems contracts. Neither DLA nor DCMA has the

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resources required to closely monitor the many, many pieces of tooling in the hands of small manufacturers. When a small company goes out of business it can be frequently difficult to retrieve that special tooling. Thus, DLA relies on the special tooling clause to ensure the contractor records the whereabouts of that tooling and to ensure it is in good working condition before returning to the Government.

Without the substance of the special tooling clause, the traceability of the tooling is greatly diminished for small contracts. Without the clause the end result will be that each time an item is procured another set of tooling may have to be fabricated, significantly increasing overall costs to the government, lengthening production lead times, and ultimately increasing customer waits during an uptempo environment. For these reasons, DLA suggests that the special tooling clause provides an important function for the government and elimination of its substance will create unintended and detrimental effects.

Recommendation:

To allow for proper oversight and accountability of government-owned special tooling in the possession of contractors, the Proposed Rule should be amended as follows:

1) The Proposed Rule merges several current FAR clauses into a new proposed 52.245-1 clause. Amend the new proposed clause 52.245-1 to add ALT III.

Add: 45.107(a) (4) Contracting Officer may use the clause with its Alternate III when a contract calls for Government provided or contractor acquired special tooling and additional oversight is needed, e. g. for contracts awarded F.O.B. Destination utilizing local property administration.

Alternate III (Date). As prescribed in 45.107(a) (4), add paragraph (n) when Government furnished tooling is fabricated, provided or acquired and local government property oversight is necessary.

(n) This contract requires the use of Government provided or contractor acquired special tooling.

(1) Special tooling is defined as: jigs, dies, fixtures, molds, patterns, taps, gauges, other equipment and manufacturing aids, all components of these items, and replacement of these items, that are of such a specialized nature that without substantial modification of alteration their use is limited to the development or production of particular supplies or parts thereof or performing particular services. It does not include material, special test equipment, facilities (except foundations and similar improvements necessary for installing special tooling), general or special machine tools, or similar capital items. Special tooling, for the purpose of this clause; does not include any item acquired by the Contractor before the effective date of this contract, or replacement of such items, whether or not altered or adapted for use in performing this contract, or items specifically excluded by the Schedule of this contract.

(2) Initial list of special tooling. If the Contracting Officer so requests, the Contractor shall furnish the Government an initial list of all special tooling acquired or manufactured by the Contractor for performing this contract (but see paragraph (3) for tooling that has become obsolete). The list shall specify the nomenclature, tool number, related product part number (or service performed), and unit or group cost of the special tooling. The list shall be furnished within 60 days after delivery of the first production end item under this contract unless a later date is prescribed.

(3) Changes in design. Changes in the design or specification of the end items being produced under this contract may affect the interchangeability of end item parts. In such an event, unless otherwise agreed to by the Contracting Officer, the Contractor shall notify the Contracting Officer of any part not interchangeable with a new or superseding part. Pending disposition instructions, such usable tooling shall be retained and maintained by the Contractor.

(4) Final list of special tooling. When all or a substantial part of the work under this contract is completed or terminated, the Contractor shall furnish the Contracting Officer a final list of special tooling with the same information as required for the initial list under paragraph (2). The final list shall include all items not previously reported under paragraph (2). The Contracting Officer may provide a written waiver of this requirement or grant an extension. The requirement may be extended until the completion of this contract together with the completion of other contracts and subcontracts authorizing the use of the

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special tooling. Special tooling that has become obsolete as a result of changes in design or specification need not be reported except as provided for in paragraph (3).

(5) Disposition instructions. The Contracting Officer shall provide the Contractor with disposition instructions for special tooling identified in a list or notice submitted under paragraphs (2), (3), or (4) of this clause. The instructions shall be provided within 90 days of receipt of the list or notice, unless the period is extended by mutual agreement. The Contracting Officer may direct disposition by any of the methods listed in subparagraphs (i) through (iv) of this paragraph, or a combination of such methods. Any failure of the Contracting Officer to provide specific instructions within the 90 day period shall be construed as direction under subparagraph (5) (iii).

(i) The Contracting Officer shall give the Contractor a list specifying the products, parts, or services for which the Government may require special tooling and request the Contractor to transfer title (to the extent not previously transferred under any other clause of this contract) and deliver to the Government all usable items of special tooling that were designed for or used in the production or performance of such products, parts, or services and that were on hand when such production or performance ceased.

(ii) The Contracting Officer may accept or reject any offer made by the Contractor to retain items of special tooling or may request further negotiation of the offer. The Contractor agrees to enter into the negotiations in good faith. The net proceeds from the Contracting Officer's acceptance of the Contractor's retention offer shall either be deducted from amounts due the Contractor under this contract or shall be otherwise paid to the Government as directed by the Contracting Officer.

(iii) The Contracting Officer may direct the Contractor to sell, or dispose of as scrap, for the account of the Government, any special tooling reported by the Contractor under this clause. The net proceeds of all sales shall either be deducted from amounts due the Contractor under this contract or shall be otherwise paid to the Government as directed by the Contracting Officer. To the extent that the Contractor incurs any costs occasioned by compliance with such directions, for which it is not otherwise compensated, the contract price shall be equitably adjusted in accordance with the Changes clause of this contract.

(iv) The Contracting Officer may furnish the Contractor with a statement disclaiming further Government interest or rights in any of the special tooling listed.

(6) Additional Instructions. Tooling to ship shall be properly packaged, packed, and marked in accordance with the directions of the Contracting Officer. Tooling to be stored shall be stored pursuant to a storage agreement between the Government and the Contractor, and as directed by the Contracting Officer. Tooling shipped or stored shall be accompanied by operation sheets or other appropriate data necessary to show the manufacturing operations or processes for which the items were used or designed. To the extent that the Contractor incurs costs for authorized storage or shipment under this paragraph and not otherwise compensated for, the contract price shall be equitably adjusted in accordance with the Changes clause of this contract.

(7) Subcontract provisions. In order to perform this contract, the Contractor may place subcontracts (including purchase orders) involving the use of special tooling. If the full cost of the tooling is charged to those subcontracts, the Contractor agrees to include in the subcontracts appropriate provisions to obtain Government rights comparable to the rights of the Government under this clause (unless the contractor and the Contracting Officer agree that such rights are not of substantial interest to the Government). The Contractor agrees to exercise such rights for the benefit of the Government as directed by the Contracting Officer.

(end of clause)